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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1922.

FEDERAL TRADE COMMISSION,

Petitioner,

v.

STANDARD OIL COMPANY (NEW JERSEY),

Respondent.

No. 637.

RESPONDENT'S BRIEF.

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TABLE OF CONTENTS.

	PAGES
STATEMENT	1–3
QUESTIONS INVOLVED	3
INTRODUCTION	3–13
BRIEF OF ARGUMENT	14
ARGUMENT	15–50
I. The trade practice does not involve nor is it injurious to a "Public Interest"	15–18
(*a*) Meaning of the words "Public Interest"	15
(*b*) The evidence fails to show that "Public Interests" have been injured	15–18
II. The Trade Practice complained of is not "unfair competition", as is meant by the Federal Trade Commission Act	19–29
(*a*) Meaning of the words Unfair Competition	19–22
(*b*) The complaint fails to sufficiently allege necessary facts to show unfair competition	22–23
(*c*) The evidence fails to establish the charge of unfair competition	23–25
The effect of Respondent's Trade Mark rights on the question of Fairness	25–29

PAGES

III. The Leasing and Loaning Agreements complained of do not constitute "tying contracts" within the provision of Section 3 of the Clayton Anti-Trust Act..... 29–33

(*a*) What are "Tying Contracts" so called 29

(*b*) The evidence fails to show that the agreements are tying contracts violating the law 30–31

Legal character of Curb Outfit Contract 32–33

IV. The tying contracts, so called, do not have the effect of substantially lessening competition or of tending to create a monopoly within the intent of Section 3 of the Clayton Anti-Trust Act..... 34–43

(*a*) As to the complaint. Count Two.... 34

(*b*) The evidence fails to show that competition is lessened or that there is a tendency to create a monopoly.. 34–43

V. The order "to cease and desist" is at variance with the allegations of the Complaint and the Report and Findings.... 44–46

(*a*) Complaint 44

(*b*) The Report, Findings and Conclusions 44–45

(*c*) The order 46

VI. The order to "cease and desist" is in other respects illegal 46–47

CONCLUSIONS 47–50

APPENDIX 51–72

Leasing and Loaning Agreement..... 65–67

Federal Trade Commission Act, Section 5... 68–71

Clayton Anti-Trust Act, Section 3..... 72

TABLE OF CASES AND REFERENCES CITED.

	PAGES
A. B. Farquhar Co. *v.* National Harrow Co., 102 Fed. 714	55
Adriance Platt & Co. *v.* National Harrow Co., 121 Fed. 827	55
Alger *v.* Keith, 105 Fed. 105	56
American Law Book Co. *v.* Edward Thompson Co., 84 N. Y. Supp. 225	52
American Malting Co. *v.* Keitel, 217 Fed. 672	53, 54
American Washboard Co. *v.* Saginaw Mfg. Co., 103 Fed. 281	59
Anderson *v.* U. S., 171 U. S. 604	43
Angle *v.* Chicago, *et al.*, Ry. Co., 151 U. S. 1	52
Attorney General *v.* National Cash Register Co., 148 N. W. 420	53, 56
Bailey *v.* Master Plumbers, 103 Tenn. 99	55
Bishop *v.* Weber, 139 Mass. 411; 1 N. E. 154; 52 Am. Rep. 715	64
Bitterman *v.* L. & N. R. R. Co., 270 U. S. 205	53
Boggs *v.* Furniture Co., 163 Iowa, 106	51
Canal Co. *v.* Clark, 13 Wall, 311, 322	59
Catt *v.* Tourle, L. R. 1869, 4 Ch. App. 654	33
Chemical Co. *v.* Meyer, 139 U. S. 544, 11 Sup. Ct. 627; 35 L. Ed. 249	59
Citizens Heat, Light & Power Co. *v.* Montgomery Co., 171 Fed. 553	52
City of Findley *v.* Pertz, 66 Fed. 427	56
Coats *v.* Merrick Thread Co., 149 U. S. 562	56, 58
Coca Cola *v.* Butler, 229 Fed. 224	26, 63
Cyc. 38, page 576	60
Dixon *v.* Bell, 5 Maul & Sel. 198	64
Eastman Kodak Co. *v.* Reichenbach, 79 Hun, 183.	54
Economist Furnace Co. *v.* Wraught Iron Range Co., 86 Fed. 1010	56

PAGES

Electric Renovator Mfg. Co. *v.* Vacuum Cleaner Co., 189 Fed. 754 55
Elkins Bly & Co. *v.* McKean, 79 Pac. St. 493-502 .. 23
Emack *v.* Kane, 34 Fed. 46 55
Employing Printers' Club *v.* Dr. Blosser Co., 122 Ga. 509 53
Evanson *v.* Spaulding, 150 Fed. 522, 149 Fed. 913. 56

Farmers Handy Wagon Co. *v.* Beaver Silo & Box Mfg. Co., 236 Fed. 731 58
Federal Trade Commission *v.* Gratz, *et al.*, 258 Fed. 314 ..... 17, 60
Feigenspan, Christian, *v.* Nizalik, 65 Atl. 703 32
Ferns *v.* American Brwg. Co., 155 Ind. 539 32

Goodyear India Rubber Glove Mfg. Co. *v.* Goodyear Rubber Co., 128 U. S. 604 59
Greene, *In re*, 52 Fed. 104 43

Halsburys Laws of England, 573 32
Holmes *v.* Clisby, 118 Ga. 820 54
Huset *v.* J. I. Case Threshing Mach. Co., 120 Fed. 865, 57 C. C. A. 237, 240; 61 L. R. A. 303 64

Ingersoll, Robt. H. *v.* Hahne & Co., 108 Atl. 128 ... 32

Jackson, *et al.*, *v.* Sranfield, 137 Ind. 592 55
Jos. Schlitz Brewing Co. *v.* Nielson, 77 Nebr. 868 (1906) 32

Keep *v.* National Tube Co. (C. C.), 154 Fed. Rep. 121 64
Ketterer *v.* Armour (D. C.), 200 Fed. 322 64
Klingels Pharmacy *v.* Sharp & Dohme, 104 Md. 218 55
Kraus *v.* Peebles, 58 Fed. 585 26

Lewin *v.* Welsbach Light Co., 81 Fed. 904 55
Lewis *v.* Bloede, 202 Fed. 7 53

PAGES

Mazetti *v.* Armour, 75 Wash. 622, 135 Pac. 633, 45 L. R. A. (N. S.) 213; Ann. Cas. 1915 C. 140 64

McLean *v.* Fleming, 96 U. S. 251, 24 L Ed. 828... 59

N Y. Trap Rock Co. *v.* Brown, 43 Atl. 100..... 32

Norton *v.* Sewell, 106 Mass. 411; 1 N. E. 154; 52 Am. Rep. 715..... 64

Pennsylvania Iron Works Co. *v.* Henry Voght Machinery Co., 96 S. W. 551..... 55

Peoples Tobacco Co. *v.* American Tobacco Co., 17 Fed. 396 53

Peters *v.* Johnson, 50 W. Va. 644; 41 S. E. 190; 57 L. R. A. 428; 88 Am. St. Rep. 909..... 64

Peterson *v.* Standard Oil Co., 55 Or. 511; 106 Pac. 337; Am. Cas. 1912 A. 625..... 64

Philadelphia Extracting Co. *v.* Keystone Extracting Co., 176 Fed. 830..... 54

Prest-O-Lite Co. *v.* Davis, 209 Fed. 917..... 58

Proctor & Gamble *v.* The Globe Refining Co., 92 Fed. 357..... 57

Racine Paper Goods Co. *v.* Dittgen, 171 Fed. 631.. 55

Rathbone Sard & Co. *v.* Champion Steel Range Co., 189 Fed. 26..... 60

Riggs *v.* Standard Oil Co. (C. C.), 130 Fed. 199.. 64

Robt. H. Ingersoll & Bro. *v.* Hahne & Co., 108 Atl. 128..... 32

Roberts *v.* Brewing Co., 211 Mass. 1; 1 N. E. 154; 52 Am. Rep. 715..... 64

Rogers on Good Will, Trade Marks, Unfair Trading, etc., 129 60–61

Russia Cement Co. *v.* Katzenstein, 109 Fed. 314... 27

Schlitz Brewing Co. *v.* Irari & Controla, 179; see Ap. 269 (1913)..... 32

Scriven *v.* North, 134 Fed. 366..... 57

Search Light Gas Co. *v.* Prest-O-Light Co., 215 Fed. 692 58

PAGES

Sears Roebuck & Co. *v.* Federal Trade Commission, 258 Fed. 307 ..... 18, 19, 32
Spalding *v.* Gamage, 32 Reps' Patent Cases, 273 .. 26
Sperry & Hutchinson Co. *v.* Associated Merchants Stamp Co., 208 Fed. 205 53
Sperry & Hutchinson *v.* Pommer, 199 Fed. 309 ... 52
Standard Fashion Co. *v.* Magrave Houston Co., 259 Fed. 793 32
Standard Fashion Co. *v.* Magrane Houston Co., 42 S C. R. 360, 362 43
Standard Oil Co. *v.* Murray, 119 Fed. 572 64
Statler *v.* Mfg. Co., 195 N. Y. 478; 88 N. E. 1063 .. 64
Sterling Remedy Co. *v.* Eureka Chemical & Mfg. Co., 80 Fed. 105 57
S. S. White Dental Mfg. Co. *v.* Mitchell, 188 Fed. 1017 54

Thomas *v.* Winchester, 6 N. Y. 397; 57 Am. Dec. 455 64
Tomlinson *v.* Armour & Co., 75 N. J. L. 748; 70 Atl. 214; 19 L. R. A. (N. S.) 923 64
Tunstall, *et al, v.* Stearns Coal Co., 192 Fed. 808 .. 53
Tuttle *v.* Buck, 107 Minn. 145 51

Union Switch & Signal Co. *v.* Sperry, 169 Fed. 926 54
United Shoe Machinery Corporation *v.* United States, 42 S. C. R. 363, 365 43
U. S. *v.* Addyston, 285 Fed. 271 43
U. S. *v.* Basic Products Co., 260 Fed. 472 32
U. S. *v.* Bowser & Co., U. S. Dis. Ct., Ind 22, 62
U. S. *v.* Carter, 217 U. S. 286 56
U. S. *v.* Colgate & Co., 250 N. S. 300 ..... 28, 42
U. S. *v.* Joint Traffic Assn., 212 Fed. 456 32
U. S. *v.* Patterson, 205 Fed. 292 55
U. S. *v.* Schraders Sons., Inc., March 1, 1920 42
U. S. *v.* Standard Oil Co., 173 Fed. 177 ..... 32, 42
U. S. *v.* Whiting, 212 Fed. 456 32

	PAGES
Walker *v.* Cronin, 107 Mass. 555	53
Walter Baker Co. *v.* Gray, 192 Fed. 921	58
Waters-Pierce Oil Company *v.* Deselms, 212 U. S. 159, 179	23, 64
Weiboldt *v.* Standard Fashion Co., 80 Ill. App. 67	32
Wellington *v.* Oil Co., 104 Mass. 64	64
Wells & Richardson Co. *v.* Abraham, *et al.*, 146 Fed. 190	53
Wheeler-Stenzel Co. *v.* American Window Glass Co., 202 Miss. 471	52
Whitewell *v.* Continental Tobacco Co., 125 Fed. 454	32, 42
Wood *v.* Hart, 50 Nebr. 497, 70 N. W. 50	32

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FEDERAL TRADE COMMISSION,
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AGAINST

STANDARD OIL COMPANY (NEW JERSEY),
Respondent.

No. 637.

On Certiorari to United States Court of Appeals, Third Circuit.

BRIEF IN BEHALF OF STANDARD OIL COMPANY.

Statement of the Case.

In the natural growth of the oil business, it has become the common practice for refineries and wholesale vendors of gasoline to lease and loan tanks with pump equipments commonly called "Curb pump outfits", consisting of a storage tank, a self measuring pump and the necessary equipment to permit of the use thereof, for a nominal consideration to purchasers of gasoline to re-sell at retail to consumers. Ordinarily there is an agreement that no product other than that sold by the Company furnishing the "Outfit" shall be handled in or sold from the outfit so leased or loaned. There is no restriction upon the use of other outfits similarly furnished by other oil companies, or no restriction on the use or sale by the

retailer of petroleum of its products or competing oil refineries or wholesalers.

The Federal Trade Commission filed its complaint against Respondent alleging in the first count:

That the trade practices as above stated are unfair competition in violation of Sec. 5 of the Act of Congress, entitled "An act to create a Federal Trade Commission to define its powers and duties and for further purposes", approved September 26th, 1914 (38 Stat., 717), commonly called the Federal Trade Commission Act; and in the second count:

That the agreement or contracts for the lease or loan of said outfits were "tying contracts" so called and violative of Sec. 3 of the Act of Congress, entitled "An act to supplement existing laws against unlawful restraints and monopolies and for other purposes", approved October 15th, 1914 (38 Stat., 730), and generally known as the Clayton Anti-Trust Act.

After answer filed by respondent and hearings had, the petitioner made its report, findings and conclusions and issued its order directing this Respondent forever to cease and desist from;

1. Directly or indirectly leasing pumps or tanks, or both, and equipment for storing or handling petroleum products in furtherance of its petroleum business at a rental which will not yield to it a reasonable profit on the cost of same after making due allowance for depreciation and other items usually considered when leasing property for the purpose of obtaining a reasonable profit therefrom, and from doing any matter or thing which would have the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made;

2. Entering into contracts or agreements with dealers in its petroleum products or from continuing to operate

under any contract or agreement already entered into, whereby such dealers agree or have an understanding that as a consideration for the leasing to them of such pumps and tanks and other equipment, the same shall be used only for storing or handling the products of petitioner, and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made.

Thereupon respondent filed its original petition in United States Court of Appeals, Third Circuit, to review and vacate the aforesaid order, and the said court after hearing argument and reading briefs vacated the Commission's order, whereupon petitioner made application to this Honorable Court for a Writ of Certiorari which was granted and the matter is now before this Honorable Court on said Writ of Certiorari.

Questions Involved.

1. Is it sufficiently alleged or shown that the trade practices complained of in the first count of the complaint are unfair competition and violative of Sec. 5 of the Trade Commission Act?

2. Do the leasing or loaning agreements complained of constitute tying contracts so called violative of Sec. 3 of the Clayton Anti-Trust Act?

Introduction.

Oil refiners and wholesale dealers in petroleum and its products are engaged in the marketing of a dangerous substance. They are liable to the consumer in damages for injury received in its use which is due to defects in the product, and this is true regardless of the number of hands through which the product passes after it leaves

the hands of the oil refiners and wholesale dealers and before it reaches the consumer.

Assuming therefore, as we must, this burden of liability for our product after it has been sold by us, we are entitled to use all reasonable means and agencies to safeguard the public and to protect ourselves from unnecessary liability. Therefore, it is safe to say that any method which we may use in good faith for the purpose of protecting ourselves and the public does not constitute an unfair method of competition.

Hence for a proper discussion of the questions herein involved requires consideration of the manner in which the sale of gasoline and other volatile petroleum products at retail is necessarily carried on, and of the equipment required for that purpose, and the use of any system is to be judged not only in the light of our obligations to the public, but is to be judged in connection with our trademark rights.

In the natural development of the oil business and the use of gas engines, it has been found absolutely essential for the safeguarding of the public and the seller, and for the convenient and economic conduct of the business, to adopt such system of handling gasoline as will to the utmost extent accomplish the above, and the present system of "curb pump outfits" is the result of such demand. The system consists of a small storage tank, properly protected to prevent evaporation, for use as a container of the product, and which is buried underground, connected with a pump and measuring device so that the gasoline may be readily drawn from the tank.

This "curb pump outfit", so called, is the necessary equipment of every "filling station", under the laws and police regulations of various states. The "outfit" is required to be kept and used by all retailers of gasoline and volatile oils, on account of the inflammatory and explosive character of the product.

The use of containers for such purposes, when the nature of the product or convenience in handling requires them, is not unusual or novel. The milkman from time immemorial has delivered his milk in cans or bottles belonging to him, and often with his name or trademark blown or stamped thereon, and allows his customers to keep and use such containers while the contents are being consumed. Penalties are provided in many States for the use of bottles or containers of any kind bearing labels or trademarks, by anyone not entitled to use them, or for placing therein any other product or a grade of product differing from the label.

Kerosene and other less volatile oils, for many years, have been sold to retailers in barrels, and direct to householders or small consumers in large cans or cases, often marked to show the manufacturer thereof, and with some guarantee as to the character of the product. The barrels and cans being the property of the refiner, wholesaler, or seller, and returned to him when the contents had been removed by sale or consumption. When the market for more volatile oils developed, for safety in their shipment and storage during sale, it was required that shipments be made in steel barrels or drums, which were and remained the property of the refiner, wholesaler, or seller, and these containers were loaned to or allowed to be kept by the retailer for storage of the oil while being sold.

The modern universal use of gasoline in automobile engines requires, for the accommodation of the public, the establishment and maintenance of "filling stations", so-called, each equipped with a storage tank or container, pump and measuring device. More than this it is necessary, for the protection of the public as to the character of the product sold, that the gasoline sold by means of such "filling stations" be of good and uniform quality.

The purchaser cannot know by inspection the quality of the product being pumped into his automobile re-

ceiving tank. He is entitled to this knowledge. The Respondent makes or handles gasoline of a certain grade, guaranteed by it to be of a uniform quality and sold under one or more of its trademarks or names, and by a careful compliance with its representations and guarantee of their product through a number of years, have established a reputation for its gasoline under the various trade names, which creates a demand for such gasoline and is a valuable asset to the Respondent and the marketer thereof. The above applies equally as well to certain other refineries and marketers.

In order that the purchaser may obtain and know that he is getting any particular grade of gasoline so sold under a trademark or name, it is necessary that there should be some sign, device or lettering upon the pump, or delivery equipment showing what or whose make of gasoline is being sold, as a guarantee of its quality. This requires a separate tank and equipment for each separate make of gasoline sold at a "filling station", if it is desired to furnish that particular brand of gasoline to the public, just, as formerly, oil sold to a retailer in steel drums, was kept therein and drawn out as sold, thereby enabling the purchaser to see what brand of oil he was buying.

Therefore, the Respondent or any refinery or marketer of gasoline of a special quality and being sold under a trademark or name, must necessarily see to it that there is a separate tank and outfit to use for the storage and sale of his product and his alone, at every filling station where he desires to have his product sold to the public as his.

This is the fundamental fact which underlies all discussion of the trade practices involved in this case, for unless a marketer does so provide for such separate tank and equipment, he cannot possibly have his product sold to the public as his, nor protect the public in the purchase of gasoline by guaranteeing it as his well-known

product, nor protect the public and himself from injury by reason of the highly inflammable nature of the product so sold.

Unless the Respondent is allowed thus to have a separate tank and equipment for the sale of its gasoline, it loses all of the value of its trade-name and reputation for square dealing and sale of a reliable product, which it has acquired by long years of upright and honest dealing with the public. This trademark, with the reputation acquired through long years of square-dealing with the public is a valuable asset to the reputation to which it is entitled.

During the last few years the use of gasoline not only in operating automobiles but likewise in stationary engines, etc., has become quite universal, thereby creating a demand for small filling stations distributed throughout the country not only at garages and other places in large cities and towns, but also at small centers of population and at convenient places along public highways where there is no village or even dense population.

By means of these filling stations, automobiles of various kinds can readily obtain an additional supply of gasoline when needed, at practically every small village or even at the roadside, by driving up to a filling station with no loss of time. Also practically all farmers and other rural population now have automobiles, and can thus, without waste of time or consumption of gasoline, obtain a supply when needed by motoring a short distance to a filling station. This rural population also have gasoline engines in use on their farms for various purposes, farm tractors, etc., and for which they need to obtain frequently a supply of gasoline which, by means of these filling stations they can readily obtain with practically no loss of time and expense aside from the price paid.

The necessity for such small filling stations must be conceded, and the great benefit to the public by this con-

venience and the great saving of time, etc., in obtaining the needed supply of gasoline is too great to be estimated. It is inconceivable that Congress intended to give power to the Federal Trade Commission, or that the Federal Trade Commission would desire, if it had that power, to deprive the public of the great convenience afforded by these small filling stations,—they are more than a convenience,—they have become an absolute necessity.

Nearly all large manufacturers and marketers of gasoline, including the Respondent, selling the same to small retailers and other consumers who necessarily need small storage tanks, pumps, etc., in handling the product, have been for several years purchasing such tanks and equipment from the various manufacturers thereof, and keeping a supply on hand for sale to retailers and consumers of gasoline or for their own use in case they find a need of them in establishing filling stations for the sale of such gasoline.

This is unquestionably a legitimate practice so far as the Respondent knows, not the subject of complaint. It is a common practice for all manufacturers or marketers of a product requiring some special equipment or device for handling or using same, to purchase and keep for sale to their customers, such special machinery, equipment or devices as may be necessary for the customer to have in order to utilize the product purchased.

Electric light and power companies, especially in small towns, usually carry a supply of lighting bulbs, heaters, toasters, chafing dishes, percolaters, stoves, and other appliances, by means of which the electric current may be utilized by their customers. Gas companies likewise buy and keep for sale to their customers, gas stoves, grates and other appliances for the consumption of gas. This puts them in competition with local dealers and manufacturers of such articles, from whom they may happen not to make purchases, but heretofore everyone has regarded such competition as desirable instead of illegal.

Suppose, also, an electric light company, in order to have householders use electricity in cooking, should purchase stoves and rent or loan them to any householder who is willing to use them, and thus consume electricity for cooking purposes,—would this be illegal or unfair competition? In fact, this is now being done in many places.

What difference does it make to the manufacturer of electric stoves whether the householder or the electric light company pays for the stove? The manufacturer has sold it, and received his money. When it furnishes a stove, the electric company has to buy and pay for it, thus making a market for the manufacturer, resulting in a benefit. Also, so long as everyone wishing the use of a stove free, is supplied, there is no ground for complaint so far as illegal competition with other sellers of fuel or heat is concerned, whether that fuel be electricity or something else.

The manufacturers and marketers of gasoline, thus purchasing tanks and equipment, sell a large part of the tanks and pumps so purchased to garages or other retailers of gasoline, and so far as the Respondent understands, no complaint is made concerning the tanks and pumps thus sold. Such a complete outfit costs about $200.

The retailer, thus owning his own tank and equipment, can, of course, sell by means thereof whatever brand of gasoline he wishes and such dealers usually have a large business and good standing in their communities, and have established a reputation for themselves as to the quality of gasoline they sell. Their word or representation as to the brand they are selling, and its quality, may be sufficient guaranty to their trade, but, nevertheless, many of them do prefer to sell some well recognized brand, and to keep its trademark over the equipment. If their business is sufficient to justify it, such retailers may have separate tanks and sell a different brand from each.

Thus it sometimes happens that in a large garage or retailing establishment, you will find a filling equipment from which some well known brand of gasoline is being sold at a certain price, and another filling equipment from which another inferior or not so well-known brand is being sold at a less price. This is beneficial to the public, not only on account of the competition, but by the knowledge given of the brand being sold.

But it would be impossible to procure the establishment and maintenance of the great number of small filling stations in the rural districts if the operator thereof was required to buy and install such tank, pump and equipment. The amount of sales from such filling station is not sufficiently large to justify the expense to the operator or he fears that the returns thereof will not be sufficient and is unwilling to incur the expense.

Therefore, the Respondent and other large marketing companies have been compelled, in order to meet the demand for such filling stations, and thus be enabled to sell their gasoline to rural consumers, to establish filling stations either owned or operated by themselves, or in some way, with their assistance. In many cases they have so installed tanks, etc., and owned and operated such filling stations, either operating the same by an employee, on a salary, or by making the operator a sales agent on a commission basis, or some other satisfactory arrangement. This involves looking after accounts and collections, and involves a liability for damages or loss through negligence in operation, making it an unsatisfactory method of maintaining such stations.

However, no complaint is made and it is admitted by the Government counsel in regard to the maintenance of filling stations thus established that no legal objection could be made unless it is to be contended that the large manufacturer and marketer of gasoline must not engage in retail trade, but must sell to local dealers exclusively.

Also, and this is the real subject of the complaint, in order to establish and have filling stations maintained, where the business is small, nearly all marketers of gasoline have adopted a method of loaning, on what is known as a lease contract, a tank and equipment to anyone who wishes to take such equipment and establish and maintain a filling station. The marketer having decided beforehand so far as he is concerned that the amount of gallonage sold at such particular point warrants the loaning of such equipment. The outfit is not given to the operator of the station, but is loaned or leased to him for a nominal rental, or none at all, under the stipulation that the tank and outfit is to be used to store the gasoline or petroleum products of the lessor only, and if the lessee ceases to buy gasoline from the lessor, or uses the tank for the storage of other gasoline, then the lessor may remove the outfit unless the lessee will pay the proper price therefor.

A suitable sign, usually lighted by electricity, is attached to the outfit, having thereon the trade-name or device designating the lessor's gasoline, by means of which the lessor advertises his brand of gasoline to the public and assures purchasers of the quality or brand being sold through such outfit.

By this method of furnishing the tank and equipment, a large number of these filling stations have been established, and are being now maintained, which would not be in existence if these loan agreements had not been made, and if the marketers are required to cease this method of establishing filling stations, it will largely prevent the further installation of such small filling stations, and will compel the abandonment of many of those now in operation and will drive the large marketer to the establishment of the so-called "service stations", this necessitating the purchase of a suitable lot, erection of a building thereon and the installation of pump outfits. This method entailing an expenditure from two to twenty thousand dollars for each station, and their establishment

only in large and well populated communities. It is admitted by many of the witnesses in the case, that this could be done by the large marketers, whereas the small marketer would be unable to compete with this practice and consequently would have a corresponding decrease in the amount of his business and the convenience of the traveling public be seriously interfered with.

The marketers have invested a large amount of capital in these tanks and outfits, the Respondent's investment amounting to approximately Three Million Dollars, and if required to cancel these loan agreements and remove this equipment, will necessarily suffer great loss, as the equipment, when taken out, is second hand and would not sell for enough to pay the cost of removal.

It is, therefore, earnestly contended that these loan agreements are practically a necessary result of the modern development of the gasoline business, and are an application to this business of the ordinary and long-used method of sellers furnishing containers. The abolition of such agreements, instead of being in the interest of the public, would have serious results in the opposite direction, and would cause the abandonment of many small filling stations now in existence, and prevent the installation of additional stations in the future. In fact, it would practically compel large marketers to cease trying to sell their gasoline under their own brand direct to consumers by filling stations, and would confine the sale thereof principally to local dealers or middlemen, or would compel the establishment of highly expensive and costly service stations.

It should always be kept in mind that the refiners or marketers would greatly prefer to have such filling station owners buy and own their own tanks and pumps, which is preferable, so far as the marketer is concerned from several standpoints, one of which is that it would relieve him of all danger of liability on account of any

accident and injury to persons or property through said equipment or the manner of its installation. But the marketers wish to sell their brand of gasoline under its trade-name and to furnish the public an opportunity to buy it as such.

Therefore, if any retailer or filling station operator, or prospective operator, prefers to take a loan of a tank instead of buying one, he is allowed to do so and all are treated alike in this respect. There is nothing secret, nor any misrepresentation whatever, either to the retailer or the public. The advertisement which the lessor of the tank derives from its use is worth the full rental value of the equipment or more.

The objection to this loaning of tanks and pumps seems to be three-fold:

(*a*) In that it is claimed to lessen competition or is unfair competition with respect to pump manufacturers and

(*b*) That it also is unfair competition with respect to other oil companies.

(*c*) That the retailers of gasoline through curb pumps are monopolized by the oil company loaning the outfit.

BRIEF OF THE ARGUMENT.

I.—The "trade practice" complained of is not injurious to a "Public Interest" as contemplated by the Federal Trade Commission Act.

II.—The "Trade practice" complained of is not "unfair competition" as is meant by the Federal Trade Commission Act.

III.—The Leasing and Loaning agreements complained of do not constitute "tying contracts" within the purview of Section 3 of the Clayton Anti-Trust Act.

IV.—The Leasing and Loaning agreements do not have the effect of substantially lessening competition or of tending to create a monopoly within the intent of Section 3 of the Clayton Anti-Trust Act.

V.—The order to "cease and desist" is at variance with the allegations of the complaint and the Report and Findings and therefore is illegal.

VI.—The order to "cease and desist" is in other respects illegal.

VII.—Conclusions.

ARGUMENT.

I.

The trade practice does not involve nor is it injurious to a "Public Interest".

(a) Meaning of the words "Public Interest".

The Century Dictionary defines the word "public" as follows:

> "Regarding or directed to the interests of the community at large and not limited or confined to private, personal or selfish matters or interests."

A definition of the word "interest" by the same authority is given as "That which concerns or is of importance to".

Combining the foregoing definitions gives us as a definition of "Public Interest" the following:

> "Regarding or directed to that which concerns or is of importance to the interests of the community at large and not limited or confined to private, personal or selfish matters or interests."

(b) The evidence fails to show that "Public Interests" have been injured.

The general public that are affected by the Respondent's practice divides itself into two classes:

FIRST: Those citizens who are purchasers or users of tanks, etc., and

SECOND: Those citizens who are users of gasoline, etc., in automobiles, etc., and stationary gasoline engines for combustion purposes.

The foregoing classes will be treated together.

Only those who are in need of tanks, etc., for the storage of gasoline for their own purposes or to sell the same at retail are concerned in the use of said tanks. No evidence has been adduced to show that respondent holds a monopoly or is likely to acquire one of the tanks, etc., and by reason thereof controls the price of the same. There is nothing to show that in cases of sales of tanks, etc., such persons have been compelled to pay an exorbitant or unreasonable price or that they were unable to procure a tank, etc. Rather the evidence discloses the fact that the users have been enabled to obtain pumps on such terms as were particularly advantageous to them, thereby securing to them a class of customers who were likely to purchase other articles sold by such users (Record, Vol. III, p. 56); that many users were able to obtain a tank, etc., who otherwise by reason of the cost thereof would never have been in a position to obtain one (Record, Vol. III, p. 112); such persons by getting such tanks, etc., have been safeguarded from the dangers of fires and explosions which are always a possibility when handling gasoline in the old forms of open tanks, buckets and funnels (and the likelihood of damage suits therefrom); that they are a valuable business asset to the retailer by reason of the trade-mark and name of the lessor and the advertising value thereof (Record, Vol. II, p. 192).

It is demonstrated that they obtain gasoline of a good uniform quality at fair prices (Record, Vol. III, p. 195); that they are furnished with better service (Record, Vol. III, p. 71); that they are protected to the best possible degree from the dangers of fire and explosions (Record, Vol. III, p. 253); that the tanks, etc., are of great convenience to them (Record, Vol. II, pp. 192, 491, 495, 496; Vol. III, pp. 56, 57, 71, 128); that the tanks, etc., are the most convenient and inexpensive way to serve the public (Record, Vol. II, pp. 232, 438, 486, 515, 516, 522); that the trade-mark or name displayed on the tank, etc., is a guarantee to them of the quality of the product (Record,

Vol. II, pp. 192, 303, 492, 511, 541, 559; Vol. III, p. 30). From this it can readily be seen that instead of being injurious to the "public interest", the practice has been and is of inestimable value.

Before passing from the consideration of this point it is suggested that the matter is different from that of the ordinary unfair competition case in equity, where it is only necessary that the Court find that the plaintiff is injured by the acts of the defendant. In the present proceeding the public interest must be involved and such interest necessarily is that as set forth in the foregoing definition. Worthy of consideration in connection herewith is the following extract from the Court's opinion in *re Federal Trade Commission* v. *Gratz et al.*, 258 Fed. 314:

> "It seems to us that unfair methods of competition between individuals are not contemplated by the act. Congress could not have intended to submit to the determination of the Commission such questions as whether a person, partnership or corporation had treated or bribed the employes of a competitor, for the purpose of inducing them to betray their employer. We think the unfair methods, though not restricted to such as violate the Anti-trust Acts, must be at least such as are unfair to the public generally. It seems to us that Section 5 is intended to provide a method of preventing practices unfair to the general public and very particularly such as if not prevented will grow so large as to lessen competition and create monopolies in violation of the Anti-trust Acts. Such a preliminary inquiry and determination constitutes a most important supplement in carrying out the public policy which those acts are intended to vindicate. This view is confirmed by the language of the section: 'Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been using any unfair method of competition in commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be

to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and place therein fixed at least thirty days after the service of said complaint.'

"No authority is given to any individual to present his grievances, and the Commission is to interpose only in the interest of the public. . . .

"Counsel for the commission calls our attention to the opinion of the Circuit Court of Appeals for the Seventh Circuit, *Sears, Roebuck & Company, Petitioners*, vs. *Federal Trade Commission, Respondent*, 258 Fed. 307. The practice there prohibited as unfair was extensive advertising containing false and misleading statements calculated to deceive all purchasers and to discredit all competitors. It was clearly a method unfair to the public generally.

"As we think there is no evidence to support any general practice of the respondents to refuse to sell ties unless the purchaser bought at the same time necessary amount of the American Manufacturing Company's bagging, and that the commission has no jurisdiction to determine the merits of specific individual grievances, the order is reversed."

In affirming the decision of the lower Court in this case the United States Supreme Court declared:

"Nothing is alleged which would justify the conclusion that the public suffered injury, or that competitors had reasonable ground for complaint."

II.

The Trade Practice complained of is not "unfair competition", as is meant by the Federal Trade Commission Act.

(a) *Meaning of the words "Unfair Competition".*

The Act does not define what unfair methods of competition are. As urged before, the present proceeding is to be determined upon different principles than that of the ordinary unfair competition case in equity cases. There is not required to be present in such cases the "public interest" that is required in the present case. The Court in the Gratz case says:

> "The words 'unfair method of competition' are not defined by the statute, and their exact meaning is in dispute. It is for the courts, not the Commission, ultimately to determine, as matter of law, what they include. They are clearly inapplicable to practices never heretofore regarded as opposed to good morals because characterized by deception, bad faith, fraud, or oppression, or as against public policy because of their dangerous tendency unduly to hinder competition or create monopoly. The act was certainly not intended to fetter free and fair competition as commonly understood and practiced by honorable opponents in trade."

In the *Sears Roebuck* case, *Sears, Roebuck & Co.* v. *Federal Trade Com.*, 258 Fed. 307, the court says:

> "On the face of this statute the legislative intent is apparent. The Commissioners are not required to aver and prove that any competitor has been damaged or that any purchaser has been deceived. The Commissioners, representing the Government as *parens patriæ* are to exercise their common sense, as informed by their knowledge of the general idea of unfair trade at common law, and stop all those

trade practices that have a *capacity or a tendency to injure competitors directly* or through deception of purchasers, quite irrespective of whether the specific practices in question have yet been denounced in common law cases. But the restraining order of the Commissioners is merely provisional. The trader is entitled to his day in court, and there the same principles and tests that have been applied under the common law or under statutes of the kinds hereinbefore recited are expected by Congress to control. This *prima facie* reading of legislative intent is confirmed by reference to committee reports and debates in Congress, wherein is disclosed a refusal to limit the Commission and the courts to a prescribed list of specific acts. Cong. Rec., 63rd Cong., 2nd session, pp. 13, 18, 533, 12246. And this interpretation is not affected by the subsequent adoption of the Clayton Act, October 15, 1914, condemning certain specific acts."

An examination of the proceedings in the Senate at the time this statute was under consideration discloses, to some extent at least, the broad scope which Congress intended the act should have.

"Every practice and method between competitors upon the part of one against the other that is against public morals." Senator Newlands.

"It is that competition which is resorted to for the purpose of destroying competition, of eliminating a competitor and of introducing monopoly . . . The unfairness must be tinctured with unfairness to the public, not merely with unfairness to the rival or competitor." Senator Cummins (pp. 12, 150).

"Unfair competition means what the people who use the English language commonly believe that those words mean." Senator Cummins (p. 13879).

Senator Walsh gave the term "the meaning which it has to-day in common parlance and the accepted significance that it has in the literature of this our day" (p. 14138).

"Competition is unfair when it resorts to methods which shut out competitors who by reason of their efficiency might otherwise be able to continue in business and prosper. Without the use of unfair methods no corporation can grow beyond the limits imposed upon it by the necessity of being as efficient as any competitor." Senator Hollis (p. 1322[illegible]).

And Former Federal Trade Commissioner Joseph E. Davis sets forth in "Trust Laws and Unfair Competition" a list of acts judicially decided as unfair competition, namely:

"(*a*) Inducing breach of competitors' contracts (*See I of Appendix, pp. 51-53, Brief*);

(*b*) Enticing employees from the service of competitors (*See II of Appendix, p. 53, Brief*);

(*c*) Betrayal of trade secrets (*See III of Appendix, p. 54, Brief*);

(*d*) Betrayal of confidential information;

(*e*) Appropriation of values created by competitors' expenditures;

(*f*) Defamation of competitors and disparagement of competitors' goods (*See IV of Appendix, pp. 54-55, Brief*);

(*g*) Misrepresentation by means other than words;

(*h*) False claims to testimonials;

(*i*) Intimidation of competitors' customers by threats of infringement suits;

(*j*) Combinations to cut off competitors' supplies or to destroy their market (*See V of Appendix, p. 55, Brief*);

(*k*) Intimidation, obstruction, and molestation of competitors or customers (*See VI of Appendix, p. 56, Brief*);

(*l*) Preventing the sale of competing goods by demanding contracts for exclusive dealing;

(*m*) Bribery of employees (*See VII of Appendix, p. 56, Brief*);

(*n*) Competing with purchaser after the sale of business and good will;

(*o*) Passing off the goods of one manufacturer or dealer as those of another" (*See VIII of Appendix, pp. 56-62, Brief*).

The Government having before it all of the foregoing opinions of courts evidently undertook to draw up the decree in *U. S. v. F. S. Bowser & Co., et al.*, U. S. Dis. Ct., Ind., in such a manner as would embrace the complete list as given by Mr. Davies, and such decree in the consideration of the present case is worthy of the attention of the Court. (See No. IX of Appendix, pp. 62-63, Brief.)

The Court in the Gratz case places unfair methods in two classes, *viz:*

(*a*) Those opposed to good morals because characterized by deception, bad faith, fraud, or oppression; or

(*b*) Those against public policy because of their dangerous tendency unduly to hinder competition or create a monopoly.

(b) *The complaint fails to sufficiently allege necessary facts to show "unfair competition".*

Necessarily to have drawn a sufficient complaint it was incumbent upon the Petitioner to have alleged the facts upon which it based its claim of unfair competition, and such facts to have been sufficient should have shown how the practice was against good morals; what deception, bad faith, fraud or oppression was used by Respondent; or in what the practice was against public policy because of its dangerous tendency unduly to hinder competition or create a monopoly.

Count one of the complaint contains a general statement that the leasing of pumps for a nominal consideration, etc., is "with the effect of stifling and suppressing competition", but fails to show facts that the practice has

such an effect or that show it injures the public. The allegation is that by reason of this method, Respondent's competitors have lost customers.

Respondent says that count one of the complaint should be dismissed.

(c) *The evidence fails to establish the charge of unfair competition.*

Looking at the question raised by the curb pump outfits with the foregoing decided cases and definitions in mind, it is important to note that the use of these outfits, which is now general throughout the country, is not the result of an attempt on the part of a few of the oil companies to lessen competition, but is in use because it is the most efficient and practical method for distributing gasoline to the consumer. If this be the fact, it of course follows that it is to the public interest that the use of this system should not be interrupted.

It might well be, however, that, while the system is a desirable one, Respondent's use of it is unfair. This question must be considered in the light of all of its legal obligations to the public connected with its sale of gasoline.

Respondent is marketing a dangerous substance. It is liable to the consumer in damages for injury received in its use which is due to defects in the product, and this is true regardless of the number of hands through which the product passes after it leaves you and before it reaches the consumer. This is specifically laid down in connection with oil products in *Elkins Bly & Co.* v. *McKean*, 79 Pa. St. 493-502; approved in *Waters-Pierce Oil Co.* v. *Deselms*, 212 U. S. 159-179. (*See also No. X, Appendix, pp. 63-64, Brief.*)

The evidence shows that the Respondent purchased tanks with pump equipment from responsible pump manufacturers (Record, Vol. II, pp. 505, 506); that such tanks, etc., were sent to Respondent's warehouse in different

localities (Record, Vol. II, p. 506); that upon request a pump was taken out of its warehouse and installed at customer's place of business (Record, Vol. II, p. 506); that generally an agreement or lease was signed, which agreement contains a condition regarding lessee or loanee not to store or handle products other than those of Respondent in said tanks, etc. (*see copy agreement No. VI of Appendix, pp. 65-67, Brief*); that the reasons for the use of said tanks, etc., were, first, increase in consumption of gasoline by increasing the number of gas engines being used (Record, Vol. III, p. 278); second, public convenience (Record, Vol. II, pp. 192, 491, 495, 496; Vol. III, pp. 56-57, 71, 128); third, economic changes (Record, Vol. III, pp. 253-57); fourth, protection to public and seller (Record, Vol. II, pp. 540-41); fifth, protection to Respondent in its trading marks and trade names (Record, Vol. II, pp. 192, 303, 540; Vol. III, pp. 253-57).

Neither the complaint nor the evidence shows that the Respondent did not properly obtain their tanks, etc., as merchants usually do. In fact the proof offered shows that the pump manufacturers have two methods of selling, one through salesmen throughout the field and the other through direct sales in bulk to oil companies or other large purchasers (Record, Vol. III, pp. 182-184).

The proof shows that the oil companies kept some tanks, etc., on hand so that they could easily furnish a retailer with one when needed (Record, Vol. III, pp. 253-257); neither is it alleged or shown by the evidence that Respondent had a monopoly of either tanks, pumps or any part of the equipment thereof; or had the ability, purpose or intent to acquire one; there is nothing in the complaint or proof but what shows Respondent acting independently used its lawfully acquired property in its usual course of business without deception, misrepresentation or oppression, and there is nothing in the evidence to show that the effect of the trade practice may be or is to substantially lessen competition. On the contrary, the

evidence overwhelmingly shows that such practice makes for competition (Record, Vol. II, pp. 18, 19, 62, 90, 95, 96, 124, 129, 158, 214, 233, 234, 236, 237, 283, 286, 258, 304, 361, 362, 394, 395, 418, 451, 496, 511-518; Vol. III, pp. 163-170, 258-260); is the best means for a new concern to get started (Record, Vol. II, pp. 334, 362, 424, 438, 443, 566; Vol. III, pp. 69, 198, 258-260, 282-283); and that many companies have been able to build up a surplus from such practice (Record, Vol. II, pp. 147-149, 152).

In the further discussion of the above point, it is necessary for us to see—

The Effect of Respondent's Trade-Mark Rights on the Question of Fairness.

Respondent's use of the tank, etc., system is to be judged not only in the light of its obligations to the public, but it is to be judged in connection with its trade-mark rights. It has important property rights in the name "Standard" as applied to gasoline; definite privileges are granted it by law in the protection and use of that mark. It has created a demand for "Standard" gasoline by advertising, by fair dealing, by good quality. The public seeks its product under that name or other trade names. It has a right to use all reasonable precautions to see to it that the public obtains its product in the condition in which it wishes them to receive it. It has a right to use a trade-mark in selling its goods. It has a right to the entire and exclusive use of that mark in its particular line of business. If that name is discredited it suffers injury. Respondent has, therefore, a right to use all necessary measures to protect it.

Its gasoline is delivered to the consumer in the tank on his premises. It is practically the same as if Respondent delivered it to him in an original package. The pump bears its name and trade-mark. Under these circum-

stances it has a right to prescribe definite conditions under which the gasoline shall be sold.

A similar situation arises in connection with the bottling of drinks by others than the manufacturers of the syrups which are the basis of the drinks. In the case of *Coca-Cola* v. *Butler*, 229 Fed. Rep. 224 (1916), the defendant was enjoined from putting the trade-mark "Coca-Cola" on a carbonated drink bottled by the defendant but made with genuine Coca-Cola syrup. One of the reasons given for this decision and other similar decisions referred to in the opinion in this case is that unless the manufacturer can control the bottling he cannot guarantee that the bottled drink is the genuine article prepared by him, for which he is responsible to the public for the reason that it bears his trade-mark. It might be added that otherwise the manufacturer could not be sure that the bottled drink is a safe beverage for the use of the public.

There are a number of cases to this same effect, most if not all of which are referred to in the opinion in the Butler case.

This same rule as to the use of trade-marks has recently been considered by the House of Lords in the case of *Spalding* v. *Gamage*, 32 Rep's. Patent Cases, 273 (1915). In this case Spalding, the sporting goods dealer had been selling foot-balls under the name "Orb". The foot-balls turned out to be unsatisfactory, and Spalding sold the entire lot to a secondhand dealer. Subsequently, the defendant purchased these goods from the secondhand dealer and began to sell them under the name "Orb". An injunction forbidding the defendant to use plaintiff's trade-mark in connection with these foot-balls, although they had actually been made by the plaintiff, was upheld by the House of Lords.

In *Krauss* v. *Peebles*, 58 Fed. Rep. 585, the plaintiff sold whiskey in bulk to the defendant, who bottled it and put on the bottles labels used by the plaintiff on whiskey which he bottled himself.

Taft, *J.*, held:

> "It is doubtful whether the sale of merchandise in bulk under the trade-mark of the maker carries with it, as incident thereto, the right in the vendee to use the same trade-mark as a trade-mark on smaller retail packages" (p. 501).

In *Russia Cement Co.* v. *Katzenstein*, 109 Fed. Rep. 314, the plaintiff sold glue of various grades. The best grade it sold under the name "Lee Pages Liquid Glue". The lowest grade it sold as "Lee Pages Fish Head Glue". Defendant bought plaintiff's cheapest grade in bulk, bottled it and resold it under the name "Lee Pages Glue", and was enjoined from so doing.

These cases show the importance which the courts attach to securing to trade-mark owners the control of their trade-marks.

Respondent's gasoline is offered to the public, as was said above, in tanks bearing its trade-mark. It is justified, under these rules, in employing whatever means are necessary to enable it to deliver its product to consumers in the condition in which it desires to have them receive it. If its gasoline is not sold from tanks used only for its product and installed by it, its service to the public will prove unsatisfactory and the reputation of its gasoline will suffer, and it is therefore justified in using such means to protect its trade-mark property rights.

In passing such statutes as the Federal Trade Commission Act and the Sherman Law, it was not the intention of Congress, apparently, to override the fundamental rights which men enjoy under the law—merely to prevent restraint of trade and unfair competition. Undoubtedly it is possible for one deliberately setting out to restrain trade or to act unfairly, to make use of rights which he enjoys under the law to bring about these very ends which are illegal; but, in the absence of specific proof that the acts in question are committed with such

intent, fundamental rights, such as petitioner's rights which have been referred to, are not affected. This is evident from the case of *United States* v. *Colgate & Co.*, recently decided by the United States Supreme Court (250 U. S. 300). In this case the court holds:

> "In the absence of any purpose to create or maintain a monopoly the (Sherman) act does not restrict the long-recognized right of trader or manufacturer, engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal."

In this case the Government's object was to show that the defendant was guilty of a restraint of trade in refusing to sell customers who failed to resell its goods at prices set by it. The court has held in other cases that price maintenance may be a restraint of trade. In this case the Government charged in its indictment that Colgate & Company was maintaining prices by exercising this right to refuse to sell. The court quoted the decision of the district judge, as follows:

> "This, at the threshold, presents for the determination of the court how far one may control and dispose of his property; that is to say, whether there is any lawful limitation whatever, if the proceeds in respect thereto in a lawful and *bona fide* manner. That he may not do so fraudently, collusively and in unlawful combination with others may be conceded. But it by no means follows that, being a manufacturer of a given article, he may not, without incurring any criminal liability, refuse absolutely to sell the same at any price, or sell it at a named sum to a customer with the understanding that such customer will resell only at an agreed price between them and should the customer not observe the understanding as to retail prices, exercise his undoubted right to decline to further deal with such persons."

Having in mind the foregoing decisions defining unfair competition, Respondent urges that neither the complaint itself nor the evidence offered in support thereof shows that the acts of the Respondent are within or analogous to the foregoing definitions and cases, although petitioner by its order, unwarranted and unfounded, attempts to find that the Respondent is guilty of unfair competition by preventing the sale of competing goods by demanding contracts for exclusive dealing. This latter question will be argued in Point III. It is proper to asume that no type of the foregoing methods of unfair competition is present in this case.

III.

The Leasing and Loaning Agreements complained of do not constitute "tying contracts" within the provision of Section 3 of the Clayton Anti-Trust Act.

(a) *What are "Tying Contracts" so called.*

Sec. 3 of the Clayton Anti-Trust Act forbids a company or corporation to "lease" or "make a sale or contract . . . on the condition . . . that the lessee or purchaser thereof shall not use or deal in the goods" of a competitor "where the effect of such lease, sale or contract for sale, or such condition, agreement or understanding may be to substantially lessen competition or create a monopoly in any line of commerce."

Courts have not in their decisions given any general definition of "tying contracts", but rather have taken the definition as given in the act as a square to be applied to the facts in each particular case. If the facts fall within the rule the practice is restrained, otherwise not.

(b) *The evidence fails to show that the agreements are "tying contracts" violating the law.*

The second count of the complaint charges that said leasing or loaning contracts fix the price charged therefore on the condition, agreement or understanding that the lessee thereof *shall not purchase or deal in the products of a competitor or competitor's Respondents.* The record shows that the retailer may purchase products of other oil companies or wholesalers than Respondent, may sell such products, may lease, loan or buy tank equipments, but that so long as the retailer has the tank equipment of the Respondent on the lease or loan agreement, such retailer shall not dispense through such leased equipment the products of any other oil company or wholesaler.

The Commission evidently recognized that the proof failed to follow the charges in the second count, but expected to reach the same result by incorporating in the order to cease and to desist that part which restrains Respondent from "entering into contracts or agreements with dealers in its petroleum products or from continuing to operate under any contract or agreement already entered into whereby such dealers agree or have an understanding; and that as a consideration for the leasing to them of such pumps, tanks and their equipment the same shall be used only for storing or handling the products of petitioner and from doing anything having the same unlawful effect as that resulting from the practice herein prohibited, and by reason of which this order is made."

The so-called tying contracts as used by the respondent do not prohibit the lessee from handling, using or dealing in the products of competitors (See No. XI of Appendix, p. 65, Brief). They require such equipment to be used solely for the storage and handling of motor gasoline purchased by lessee or loanee of the lessor

(Record, Vol. III, pp. 253-257). The lessee or loanee is not restricted to only deal in the products of the lessor, and can, without any right or on the part of the lessor, deal with as many oil companies as he may desire, but the lessor says that such lessee shall not dispense with competitor's product through lessor's tank, etc. To dispense with another's motor gasoline or products, it is necessary for lessee to use another and different pump, which said lessee may either purchase himself or lease from such other competitor (Record, Vol. II, p. 192).

In many cases a retailer only uses one pump, etc. (Record, Vol. III, p. 70), and generally remains with one wholesaler (Record, Vol. III, p. 70). This condition has not been brought around by the leasing practice, for prior to the installation of such practice wholesalers and oil refineries were able to keep as a general rule retailers, even where such retailers own their own pumps (Record, Vol. III, p. 70).

Then again, the retailer is not compelled to lease a pump, etc., from Respondent in order to buy Respondent's products. He may buy and install his own equipment and the wholesaler will sell to him notwithstanding such retailer may buy from other wholesalers and mix the several brands of gas so purchased (Record, Vol. III, pp. 273-278). But Respondent will object to the retailer placing any sign on the pump advertising the name or brands of the Respondent, for by the use of the mixture, the public will not get the special brand of Respondent; and to permit the placing of a sign under such circumstances, would be a fraud upon the public, not only on part of the retailer but on part of the wholesaler as well.

The Legal Character of Curb Outfit Contract.

Contracts under which sales or leases are made, which contain conditions regulating the use of goods sold or leased, are generally upheld.

Robert H. Ingersoll & Bro. vs. *Hahne & Co.*, 108 Atl. 128;

U. S. vs. *Standard Oil Co.*, 173 Fed. 177;

Whitewell vs. *Continental Tobacco Co.*, 125 Fed. 454;

Standard Fashion Co. vs. *Magrave Houston Co.*, 259 Fed. 793;

U. S. vs. *Basic Products Co.*, 260 Fed. 472;

U. S. vs. Joint Traffic Ass'n, 171 U. S. 505;

U. S. vs. Whiting, 212 Fed. 456;

Sears Roebuck & Co. vs. *Federal Trade Commission*, 258 Fed. 207;

Weiboldt vs. *Standard Fashion Co.*, 80 Ill. App. 67;

Wood vs. *Hart*, 50 Neb. 497, 70 N. W. 53;

N. Y. Trap-Rock Co. vs. *Brown*, 43 Atl. 100.

Covenants in leases of saloons that the lessee shall sell only the beer of the lessor have been held good.

Ferns v. *American Brewing Co.*, 155 Ind. 539 (1900).

Joseph Schlitz Brewing Co. v. *Nielson*, 77 Nebr. 868 (1906).

Schlitz Brewing Co. v. *Irari & Contorla*, 179 See App. 269 (1913).

Christian Feigenspan v. *Nizolek*, 65 Atl. 703 (N. Ch. 1907).

18 Halsbury's Laws of Eng. 573.

The same is held of sale and lease of land. Where land was sold with the covenant that the vendor was to

have the exclusive right to sell beer to any public house erected on the land, the covenant was enforced.

Catt v. *Tourle*, L. R. 1869, 4 Ch. App. 654.

The case specifically held that the contract was not in restraint of trade.

Respondent owes an important duty to the public in connection with its sale of gasoline. It has a right to take all appropriate measures to enable it to fulfill that duty. It owns a very valuable trade-mark. It has the right to regulate the sale of its goods under that trade-mark, so far as is necessary to protect its good-will in that mark.

In exercising these rights, respondent imposes no restrictions on the dealer which prevent or discourage his operating his own tank or tanks furnished by competitors. It does not, therefore, restrain or limit the opportunity of dealers to supply to the public any and all grades of gasoline which he desires to handle, either in his own tank or in tanks furnished by the oil companies.

It is submitted from the foregoing that the agreements in question do not come within Sec. 3 of the Clayton Anti-Trust Act, as it is generally understood and has been discountenanced by the courts.

IV.

The tying contracts, so called, do not have the effect of substantially lessening competition or of tending to create a monopoly within the intent of Section 3 of the Clayton Anti-Trust Act.

(a) *As to the complaint. Count Two.*

Again respondent fails to allege the facts necessary to show how the practice lessens competition or tends to create a monopoly. It is therefore insufficient and on its face should be dismissed.

(b) *The evidence fails to show that competition is lessened or that there is a tendency to create a monopoly.*

The testimony has proven that by reason of the increase in use of gasoline better facilities for storage, safety and service were necessary to meet increasing demands; that competition in the sale of petroleum products has been greatly stimulated by their use; that retailers obtain an advertising medium through the use of the oil companies' trade marks and names; that the system has increased the number of pumps in use, the result of which has been to increase the sales of the pump manufacturers; pump manufacturers' business has continually increased each year. It is admittedly the easiest way for a new oil company to start in and obtain a business immediately. More gasoline has been sold through the system; that it has enabled oil companies to find an outlet for their large gallonage; that it enables all oil companies to trade mark their gasoline; that competition is one of the causes of the leasing and loaning system; that while a pump salesman may lose one customer by the practice, it makes him go out and get another; that the oil com-

panies buy their pumps in large quantities from the pump companies; that the majority if not all of the oil companies have been able to build up surpluses; that it has not driven any oil companies out of business.

Of the witnesses on behalf of the Commission, George F. Fox (Record, Vol. II, p. 33) admits that special containers are necessary, that it was the former practice to loan barrels and drums—that this was an old practice, and that dealers in other products, such as milk, loan bottles containing their product.

George E. Buck (Record, Vol. II, p. 230) says the practice began about six years ago, when the curb pump came into use.

Harry H. Willock (Record, Vol. II, p. 272) testifies of the old practice of loaning barrels and drums as containers and that his company still ships in drums and loans them to retailers as containers, and that it is the practice for the wholesaler to have his label on these containers (Record, Vol. II, p. 275); that the custom of loaning barrels is "as old as the oil trade and as old as any trade in liquids. There was no way to handle those liquids but by the barrel and that is the way the return package has always been, in every line. It is in the egg case, it is in everything else, any sort of business" (p. 290). Originally, the garages, like the original automobiles, were pretty bum affairs and sold gasoline out of a steel barrel on tap. This was injurious, and the tank and pump is the only proper way of dispensing gasoline. Garages should be compelled by law to use it (p. 278).

Clarence Shock (Record, Vol. II, p. 302) testifies the practice was for the wholesaler to loan the old barrel and drum to the retailer.

W. J. Metzel (Record, Vol. II, p. 326) testifies that the loaning of equipment is the general practice of all oil companies; that it is the exception when they do not engage in this uniform practice.

Geddings Cushman (Record, Vol. II, p. 439) testifies that this practice of loaning pumping equipment supersedes the old practice of loaning barrels and drums; that under the old practice the name of the wholesaler was labeled on the drums just as it is to-day labeled on the pump.

C. M. Carpenter (Record, Vol. II, pp. 119-129) testifies that in the sparsely settled territory of Vermont and New Hampshire the Standard Oil Company of New York in some places has no competition, but that they go in and establish curb pumping stations in little stores and places in the country, at farm yards, anywhere along the way where they think there is a possibility of distributing any gasoline; and (on p. 121) that there is not enough business in some of these localities to make competition profitable, although competition is now developing there by the Texas Company coming in (p. 122).

William R. King (Record, Vol. II, p. 509), whose testimony particularly applies to the present petitioner, testifies that a special container of some kind is absolutely necessary for the safe and economical dispensing of gasoline; that the original containers were wooden barrels, afterwards steel drums, which were loaned by the wholesalers; at least 90 per cent. were so loaned, and this loaning is still in vogue when gasoline is shipped in drums. That (p. 510) the increased demand caused the present pumping equipment to be adopted as the only proper container or facility for dispensing gasoline to automobiles; that the system of loaning barrels and drums to retailers was applied to the new equipment as soon as it came into use. These pumps came into use about 1914 and 1915, and the loaning system began at the same time. Also (pp. 515-516), that he pays no attention to competition in making installations. The purpose is to get their gasoline to the public in the most economical way, and pumping equipments are installed and

loaned to retailers in districts where nobody is selling gasoline but his own company. The increase in the use of gasoline in these outlying districts, where formerly there was no supply, is wonderful. Applications are received asking that installations be made, and his company investigates, and if they believe there will be sufficient business, install the equipment, loaning it if necessary in order to have it installed.

The testimony of Frederick D. Gatchell (Record, Vol. II, pp. 469-474) is to the same effect, and (p. 477) he says that this loaning system came in "just like all things that come along, new propositions that come along, improved methods of handling, and we adopted it as something that was necessary to carry on our business."

To the same effect is the testimony of C. E. Young (pp. 490-491), that when these pumping equipments came into use, the former practices of loaning containers was applied to this equipment.

Also see testimony of R. D. Leonard to the same effect (p. 587).

George F. Fox (Record, Vol. II, pp. 46-47) says the practice has resulted in more garages selling gasoline than otherwise would do so. Many little garages now have pumps that would not put them in otherwise.

H. E. Mills testifies practically to the same effect (Record, Vol. II, p. 69).

Edward J. Suor (Record, Vol. II, p. 209) testifies that competition is increasing of late, considerably and consistently.

Walter H. Goodrich (Record, Vol. II, p. 214), that more companies are operating in his field than before; that the larger companies are branching out and competing where they did not compete before.

George E. Buck (Record, Vol. II, p. 233), that the loaning system has likely caused curb pumps to be installed which otherwise would not have been; that at

the time the loaning began, his company and the Standard Oil Company of New York were the only competitors in his territory; that since the loaning began, the Gulf Refining Company and the Texas Company are competing and using the loaning system.

Harry W. Willock (Record, Vol. II, p. 261) says it causes too many pumping equipments to be installed; that (p. 269) in many cases the operator in the country would not install equipment if it were not loaned to him; that (p. 283) there are many more companies operating in his district than formerly. Originally, he had no competition; then the Atlantic Refining Company came, and one by one added on; that (p. 286) there are too many little fellows in the business, caused by this practice.

Clarence Shock (Record, Vol. II, p. 307), that the loaning system causes more stations to be established than the agency system would; that (p. 299) it is a good way for the little fellow to compete with the expensive service stations of big companies.

W. J. Metzel (Record, Vol. II, p. 335), that at one time his company had all the local trade in many localities, their only competitor then being the Standard Oil Company; now there is plenty of competition, "the woods are full of them" (p. 338). Very often, the only way a new company can get started is to loan equipment to a new garage man, or new retailer (p. 334). More oil companies are engaged in the business than two years ago—the number of companies and the amount sold has increased. This increase has been since the loaning system began (p. 335).

C. B. Matthews (Record, Vol. II, p. 352) says there are more companies operating in his territory than a few years ago, although he does not think the loaning system had much to do with it. Those that were only operating locally, and those that were only operating in other things, have pushed into gasoline, and the big

companies are reaching out to the consumer. They use this loaning system to push their business.

P. C. Hubbard (Record, Vol. II, p. 361) says competition in his territory is increasing of late years—more companies are engaged in the business; that the loaning system is a good lazy man's way of getting business—that it is the easiest way a new man can get his product to the public and develop trade (p. 362).

George J. Moore (Record, Vol. II, p. 394) says there is more competition in his district than formerly; a few years ago the Atlantic Company had practically a monopoly, it was selling to the consumer under its trade name to agencies; subsequently it adopted the loaning system instead of the agency system. It did this in sections where there was no competition. There is now competition practically everywhere in this territory—Pennsylvania and Ohio; the Atlantic Refining Company (p. 395) had practically a monopoly in many localities; other companies have been coming in by using this system, and now there is no locality where there is not competition.

Giddings Cushman (Record, Vol. II, p. 438) says that the loaning system is a good way to get business in a new territory and against established business.

The testimony of Mr. William R. King, head of the Merchandising Department of Standard Oil Company of New York, is most definite and conclusive on this subject; in Record, Vol. II, page 515, he says that the loaning practice has largely increased the number of installations, and (p. 517) that it has increased competition; that (p. 518) he counted the companies operating in his district at the end of 1915 and there were then 113. At the last count taken of them in the year 1919, there were 144. The increase has been both of large companies and local companies operating in particular localities; also, the larger companies have increased the volume of sales. On page 519 he mentions the Sinclair Oil Company, which has recently come into his territory.

Richard D. Leonard, general manager of domestic sales of Atlantic Refining Company, testifies to the same effect, and illustrates the effect of the loaning method, and says (Record, Vol. II, p. 566) that the increase in the number of people going into the business is most noticeable as is also the expansion of the business of the small man who was formerly doing a localizing business, who are now branching out and doing business at several points. He illustrates by the case of the Maloney Oil Company, which, four years ago, were doing business practically exclusively in Scranton, Pa. To-day, through the medium of loaning and leasing outfits, they are doing business in Wilkesbarre, in Shamokin and in Pottsville. They are now competing with his company in these places where they were not formerly competitors. He also illustrates how competition develops under this system, by his testimony in Record, Vol. II, pages 555-556, where in the Wilkesbarre territory his company were supplying the two garages in the town located slightly off the main street. The sales from these garages fell off and upon investigation it was found that the Maloney Oil Company, the Pure Oil Company and the Gulf Refining Company had been good enough merchants to install loaned equipments on the main street of the town and were getting the business. The public would not go to the misplaced garages; therefore, in order to retain and get their share of the business, his company installed two curb pumps, one at each end of the town so as to catch the trade.

The testimony of Mr. Gatchell of the Texas Oil Company and Mr. Young of the Standard Oil Company of New Jersey is the same as the testimony of Mr. King and Mr. Leonard.

Charles Frech (Record, Vol. III, pp. 62-91), says it is a good practice (p. 63); that those owning their own equipment usually buy from one dealer, and it is

practicaliy impossible to get their business (p. 70); that one advantage is you save on delivery by knowing whom you are going to supply (p. 75); that the man of small capital cannot afford to put in a filling station (p. 75); that his company is a small concern and their experience showed it was very difficult to get business from retailers who owned their equipment and who had been buying a satisfactory gasoline for years from the same person, and that by loaning pumps they were able to build up a trade (pp. 91-92).

Thomas K. Brushart (Record, Vol. III, p. 112) testifies that the little fellows would suffer if the loaning system was discontinued; that it would tend to drive the business to the service stations, which can only be established by the large companies; and (p. 113) that the curb pump is the utility for the little fellow and the filling station is the utility for the big fellow in the business.

J. M. Stoodt (Record, Vol. III, p. 214) testifies to the same fact, that an order preventing the loaning practice would injure the smaller companies more than the larger ones.

No testimony is adduced to show that Respondent did not obtain its tanks, etc., in a lawful manner; that any competing oil company is unable to obtain pumps or are compelled to pay exorbitant prices therefor by reason of respondent's practice; that respondent held a monopoly of tanks, etc., or any part thereof, and by reason thereof attained a monopoly of either the pump trade or gasoline business, or that it was the purpose, intent or ability to acquire one; that competitors had a reasonable ground for complaint; that respondent was doing anything else than use its lawfully acquired property in the usual course without deception, misrepresentation or oppression, and openly. Neither the oil companies have been injured nor the pump manufacturers. The entire complaint seems to come from pump salesmen, many of whom say they lost customers through

the oil companies furnishing pumps free, but it must be admitted that the loaned pump must of necessity have been purchased from a pump company and pump salesmen say that they got a commission on every pump that was sold in their territory.

The entire charge seems to be that respondent through lawfully acquired property has attempted through a lawful business method to draw to itself to the exclusion of others, and thereby monopolize a part of the trade. Every seller of goods attempts to gain as many customers as he can. So long as his methods are lawful the court will uphold him in his attempt. If such attempts are meant to be prohibited by the law then the purpose attempted to be secured by Congress, that is free and open competitive business will be defeated.

See

U. S. v. *Standard Oil Co.*, 173 Fed. 177, 191.
Whitewell v. *Continental Tobacco Co.*, 125 Fed. 454, 459.

If real competition is to continue the right of the individual to exercise reasonable discretion in respect to his own business must be preserved. *U. S.* v. *Colgate*, 250 U. S. 300; *U. S.* v. *Schraders Sons, Inc.*, March, 1920, U. S.

The engaging of many persons and corporations in the same line of business naturally makes for competition, and so long as competitors use business methods which are not unethical and without deception, misrepresentation or oppression, and thereby are able to secure a larger proportion of the public trade than another, clearly such competitors have a right to exercise reasonable discretion in respect to those business methods if real competition is to continue. It is quite conceivable that concerns capable of furnishing the public with gasoline at attractive prices, may be barred from the market to a very considerable extent from lack of sufficient

capital to enable them to install for the customers they secure a complete tank outfit on the same basis offered by respondent. If it be a fact that the use of the tank system is a normal development of gasoline distribution (Record, Vol. II, pp. 510, 520, 521, 498, 458, 598; Vol. III, pp. 83-86, 106, 108, 279-281) and exists because it is the most effective method known, it seems clear that this is a difficulty inherent to the business, which must be considered and met by those entering it, as is the case in other industries requiring large initial investments of capital.

Judge Jackson in *In Re Greene*, 52 Fed. 104, said:

> "Where the restraint is partial, either as to time or place, its validity is to be determined by its reasonableness and the existence of a consideration to support it. The question of its reasonableness depends on the consideration whether it is more injurious to the public than is required to afford a fair protection to the party in whose favor it is secured."

See also

Anderson vs. *U. S.*, 171 U. S. 604.
U. S. vs. *Addyston*, 285 Fed. 271.

The petitioner takes the position that in view of the decisions of this Court on April 10, 1922, in the case of the *Standard Fashion Company* vs. *Magrane-Houston Co.* and case of the *United Shoe Machinery Corporation*, also decided by this Court on April 17, 1922, the question of the leasing and loaning agreement being one which is violative of the law, has been fixed and determined by those cases. However the Court below in considering the leasing and loaning agreement of the Respondent has very clearly distinguished the present case from those two decided in April, 1922.

It is submitted, therefore, that on the face of the record there has been no such lessening of competition or creation of a monopoly as would bring the practice within the purview of the Clayton Anti-Trust Act.

V.

The order "to cease and desist" is at variance with the allegations of the Complaint and the Report and Findings.

(a) *Complaint.*

It has been pointed out in the argument of Point One, just what the counts of the complaint contained in the way of allegations against respondent and respondent therefore will go on to the next question, which will be in respect to

(b) *The Report, Findings and Conclusions.*

That part of paragraph 3 which reads "That petitioner, in leasing such device as aforesaid, during said period, has made and does now make, contract or leases with the said retailers in and by the terms of which the said retailer agrees to use the said device for containing, storing and vending the products of the petitioner, exclusively", is justified by the evidence; that part which reads "That the rental or lease charge provided for in such contracts is a nominal sum and that no other consideration for the leasing of such equipment by petitioner is provided for in said contracts", is not justified by the evidence for it is shown that by reason of the sign, the trademark or good will value to the respondents and vendor can be preserved and increased and the general public assured of good and proven quality; that less idle and unproductive capital is required by this method than by expensive service stations to furnish adequate service to the general public; that it is now the general custom of the trade, in which nearly all distributors are engaged and have invested much capital, to serve the public generally; that it has an advertising value to the respondent

which is of value to the public in directing its attention to the places where known quality can be had, and protects it from deceit by unscrupulous and unfair dealers.

And that part which says "that such devices are leased at nominal rentals as aforesaid, to promote and advance petitioner's petroleum and gasoline business", is true, but is this a violation of the law and can it be considered as an unfair method of competition?

Respondent has the right to put forth every legitimate effort to increase its sales, attempt to draw to itself, to the exclusion of others, as many customers and consumers as is possible.

Then again the finding "that such nominal prices or rental do not afford a reasonable profit to petitioner on the amount invested in such device" is not warranted by the evidence. Reasons why this is not true has been given in the foregoing.

Paragraph Four is true, but it is again urged that the method is not unfair.

Paragraph Five is also true, but there is nothing in respondent's leases which restrains competitors from leasing a pump, etc., to such small retailer.

Paragraph Six is partly true, but there is nothing in the evidence that warrants the finding that the leasing is done for the purpose "of preventing its competitors from obtaining as customers, the retail dealers with whom it (respondent) has entered into such contracts or leases as aforesaid".

As to Paragraph Seven. Competitors are at liberty to lease outfits if they so desire. The practice is a legitimate one for the reasons already urged, and if such competitors do not adopt such practice, and lose prospective customers, that is the natural result of their failure to meet lawful competition. As was said in the *Colgate* case, "If real competition is to continue, the right of the individual to exercise reasonable discretion in respect of his own business methods must be preserved.

(c) *The Order.*

The order directs the respondent to refrain from *leasing said pumps on a nominal consideration and upon condition that such pumps are not to be used to store or handle its own products.*

The complaint charged unfair competition and "tying contracts" as defined by the acts; the findings as to unfair competition are not warranted by the evidence and as to "tying contracts" they fail to find the facts necessary to support the charge as laid in the complaint, notwithstanding which the respondent is served with an order to "cease and desist" from doing something not charged in the complaint and not found in the findings.

VI.

The order to "cease and desist" is in other respects illegal.

The evidence shows that respondent has invested upwards of One million of dollars ($1,000,000) in tanks with pump equipments, which have been leased or loaned to retailers under agreements made in good faith. It is respondent's contention that the petitioner has failed to prove that the agreements attacked are unlawful and to permit the carrying out of petitioner's order would simply mean the confiscation of the greater portion of respondent's investment and cause great loss in value (Record, p.).

The order is of such a sweeping character that it would deprive respondent of one of its most valuable assets; viz: the advertising and marketing of its gasoline under trademarks and trade names. If the court should prohibit respondent from the continuation of its trade

practice, surely such prohibition cannot be extended to include a practice of the wholesaler of leasing or loaning a sign or globe with a trade name or mark thereon to a retailer owning his own equipment, and to be kept on such equipment to give notice to the public as to what oil company's product is being worked through said pump.

Then again such order prohibits the respondent from adopting such methods as will have the same unlawful effect as the practice of leasing and loaning for nominal consideration. Nearly all, if not all, of the witnesses admit that if the oil companies make the retailers their agents such arrangment will be just the same as the leasing or loaning practice. It is contended that such agencies would be legal and the petitioner is unwarranted in embracing such agencies in their order.

VII.

Conclusions.

Citing an extract of the Court's opinion, with particular reference to a retailer, the Court says:

> "He is restricted in the use of the leased outfit to the storage and delivery of gasoline purchased from the lessor, but he is not limited to the use of one outfit, nor is he hampered in the sale of gasoline and other products of other manufacturers. The contract leaves every competitor free to persuade the retailer to install an additional outfit or to replace the outfit already installed by one of its own. While the effect of the restrictive clause of the contract in these cases may make competition somewhat more difficult because of the inclination of the satisfied retailer to stand by his wholesaler until another comes along and offers him something better, we are of opinion that the clause does not thereby lessen

competition between wholesalers to the extent contemplated by the statute and that a tendency to monopolize the wholesale trade has not been disclosed."

It is felt that the testimony and facts which have been brought out heretofore in this point warrant the finding of the Court below. In the brief of the petitioner filed in support of its petition for writ of certiorari to the United States Court of Appeals, Third Circuit, on page 12, petitioner states

"Retailers of gasoline are of three classes, the garageowner, the proprietor of the ordinary 'curb pump and tank', and the marketing companies by direct distribution through their own 'service stations' and otherwise. The present cases relate not at all to the last-named class, but rather to the restrictive leases of equipment to the proprietors of the curb stations and to a much lesser degree to restrictive leases to the garage proprietor class. The great majority of gasoline retail supply points are curb stations."

Then again on page 14 of the Petition, petitioner states:

"It is beyond question, we submit, that where there is but one outfit on each retailer's premises, and where that one equipment is restricted to the gasoline of the leasing company, the practical effect is the monopolization of the retailer by the marketing company."

"While the evidence shows that two only of the twelve marketing companies comprised within the so-called Standard Oil Group have out nearly 13,500 leases to curb pump dealers, the Trade Commission has wholly failed to grasp the fact that the majority, if not all, of said 13,500 dealers were never before dealers until they were solicited and created such by the marketing companies. Marketing companies in order to increase their gallonage output and at the

same time give a greater convenience to the public, went out in the highways and byways of the country and talked with the corner grocery store, meat shop, clothing store, drug store and various other trades people who had never before been dispensers of gasoline, and who had never before been approached by anyone to become a gasoline dealer, and who in fact had never before thought about becoming one until they were approached by the marketing company, with the result that the marketing company so first approaching them succeeded in prevailing upon such trades people to install a curb pump upon their premises, which in effect thereby gave a greater field to the public to obtain its gasoline and at the same time brought trade in the principal line carried by such newly created dispenser of gasoline. How can it therefore be said that the marketing company monopolized a dealer when it in fact created one where there had not been one before. If one will motor along the streets and roads of this country and see how crowded they are with automobiles, he will soon learn the absolute necessity of the needs of the motorist and drivers of gasoline-driven vehicles being met by the plan adopted by the marketing companies and complained of by the Federal Trade Commission. Keen competition certainly has been created by the method and the result has inured to the benefit of the general public. It is considered that the competition thus created is lawful and that respondent has the legal right to advance itself before its competitors and to build up its own business enterprises and to use all lawful means to that end. Because respondent has the capital to carry out the method of marketing complained of, and one of its competitors may not have such capital, this is no reason why the respondent should be permitted only to measure its progress in building up its business to that quantum which its smaller competitor with less capital may be able to do."

Respondent contends that under no application of the law to the facts as brought out in this case, notwithstand-

ing petitioners attempt to so stretch its order, can the trade practice as used by it be considered as unfair competition. Respondent has come by its "Outfits" in a lawful and legal manner; has used its property without any fraud, deception or oppression on the public or competitors in business; has used it as one of its necessary equipment in properly and safely dispensing its product. Respondent submits that the public interests have not been injured, nor does the practice tend to injure the public; that the practice does not tend to lessen competition or create a monopoly, and that the contracts do not constitute "tying contracts" within the meaning of Sec. 3 of the Clayton Anti-Trust Act; that the evidence fails to support the charges as made in the complaint, and that the order to cease and desist was improvidently issued and should be vacated and declared null and void and of no binding force upon this respondent.

All of which is respectfully submitted.

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Dated, New York, March 6, 1923.

APPENDIX.

No. I.

In *Boggs* vs. *Furniture Company*, 163 Iowa, 106, the Court said:

"Men have the right to engage in lawful competition, and, though the competition may have the effect of driving another out of business, if the competition is lawful, no action arises, though injury resulted from the competition. Where there is lawful competition for gain, for supremacy in business, for the legitimate control of business, even though the purpose and effect of the competition is to drive from business competitors, yet, if the competition is lawful and carried on in a lawful way, no action will lie. There is a difference between lawful competition and simulated competition carried on with the sole purpose and intent, not of profit and gain, but of maliciously injuring others engaged in that particular business. . . . Every man has the legal right to advance himself before his fellows and to build up his own business enterprises and to use all lawful means to that end, although in the path of his impetuous movements he leaves strewn the victims of his greater industry, energy, skill, prowess, or foresight. But the law will not permit him to wear the garb of honor only to destroy. The law will not permit him to masquerade in the guise of honest competition solely for the purpose of injuring his neighbor."

In *Tuttle* vs. *Buck*, 107 Minn. 145, the court said:

"When a man starts an opposition place of business, not for the sake of profit to himself, but regardless of loss to himself, and for the sole purpose of driving his competitor out of business, and with the intention of himself retiring upon the accomplishment of his malevolent purpose, he is guilty of a wanton wrong and an actionable tort."

In *Angle* vs. *Chicago, St. Paul, Minneapolis & Omaha Ry. Co.*, 151 U. S. 1, the court defined this practice as unfair competition and said:

> "It has been repeatedly held that if one maliciously interferes in a contract between two parties, and induces one of them to break that contract to the injury of the other, the one injured can maintain an action against the wrong-doer." (Cases cited.)

In *Sperry & Hutchinson* vs. *Pommer*, 199 Fed. 309 at 314, the court said:

> "Of course the right to compete in business does not justify 'unfair' competition in business or trade or misrepresentations which tend to induce one party to a legal contract to refuse to perform it to the damage of the other party, or the giving of any form of consideration as an inducement to violate a valid contract."

In *Wheeler-Stenzel Co.* vs. *American Window Glass Co.*, 202 Mass. 471, the court said:

> "It is manifest that to knowingly and maliciously induce another to break a contract with the plaintiff is not justified by fair trade competition."

In *American Law Book Co.* vs. *Edw. Thompson Co.*, 84 N. Y. Supp. 225, the court said:

> "Intentional false statements, made with a view to obstruct the plaintiff's business, and to divert it to the defendant, are charged, and the solicitation of the subscriber's breach of contract is but a more active step in the same scheme of unfair competition."

See *Citizens Heat, Light & Power Co.* vs. *Montgomery W. P. Co.*, 171 Fed. 553 at 560, where the distinction

between fair and unfair methods of competition is set forth at length by definition and example.

See also:

Bitterman vs. *L. & N. R. R. Co.*, 207 U. S. 205.

Lewis vs. *Bloede*, 202 Fed. 7.

Sperry & Hutchinson Co. vs. *Associated Merchants Stamp Co.*, 208 Fed. 205.

American Malting Co. vs. *Keitel*, 209 Fed. 351.

Wells & Richardson Co. vs. *Abraham, et al.*, 146 Fed. 190.

Attorney General vs. *National Cash Register*, 148 N. W. 420.

No. II.

In *Walker* vs. *Cronin*, 107 Mass. 555, the court said:

"Every one has a right to enjoy the fruits and advantages of his own enterprise, industry, skill and credit. He has no right to be protected against competition; but he has a right to be free from malicious and wanton interference, disturbance or annoyance. If disturbance or loss came as a result of competition, or the exercise of like rights by others, it is *damnum absque injuria*, unless some superior right by contract or otherwise is interfered with. But if it came from the merely wanton or malicious acts of others, without the justification of competition or the service of any interest or lawful purpose, it then stands upon a different footing."

See also:

Tunstall, et al. vs. *Stearns Coal Co.*, 192 Fed. 808.

Peoples Tobacco Co. vs. *American Tobacco Co.*, 170 Fed. 396.

Employing Printers' Club vs. *Dr. Blosser Co.*, 122 Ga. 509.

No. III.

The courts have also included in the category of unfair methods of competition the disclosure, or the procurement of the disclosure, or betrayal of secret processes, formula, machinery, and other trade secrets, as where competitors induce the employees of rival concerns to enter their employment in order that they may profit by the confidential information thus acquired by such employees.

Union Switch & Signal Co. vs. *Sperry*, 169 Fed. 926.

Philadelphia Extracting Co. vs. *Keystone Extracting Co.*, 176 Fed. 830.

S. S. White Dental Mfg. Co. vs. *Mitchell*, 188 Fed. 1017.

Eastman Kodak Co. vs. *Reichenbach*, 79 Hun, 183.

No. IV.

In *American Malting Co.* vs. *Keitel*, 217 Fed. 672 at 674, the court said:

> "Where the words and writings of a defendant are not only slanderous or libelous, but are calculated to frighten, intimidate or coerce the customers or clients of the complainant into discontinuing business relations, equity may interfere by injunction."

In *Holmes* vs. *Clisby*, 118 Ga. 820, 824, the court said:

> "Such a publication, in our opinion, exceeded the bounds of legitimate competition. It is right and proper for tradesmen to puff their own goods to the disparagement of those of others, but they must not allow their zeal to betray them into an attack upon

the personal reputation of their competitors for honesty and integrity."

See also:

Pennsylvania Iron Works Co. vs. *Henry Voght Machinery Co.*, 96 S. W. 551.

In *Racine Paper Goods Co.* vs. *Dittgen*, 171 Fed. 631 at 633, the court said:

"Undoubtedly, one claiming that his patent is being infringed should take steps to advise the public of his rights as provided for by statute, provided, however, that if it is made to appear that under pressure of so doing he is pursuing a course which is calculated to unnecessarily injure another's business and with the plain intention of so doing, his conduct will be deemed malicious and he brings himself within the rule of law obtaining in cases of unfair competition in trade and subject to injunction."

See also the same case, 164 Fed. 85 at 89.

Emack vs. *Kane*, 34 Fed. 46.

Lewin vs. *Welsbach Light Co.*, 81 Fed. 904.

A. B. Farquhar Co. vs. *National Harrow Co.*, 102 Fed. 714.

Adriance, Platt & Co. vs. *National Harrow Co.*, 121 Fed. 827.

Electric Renovator Mfg. Co. vs. *Vacuum Cleaner Co.*, 189 Fed. 754.

United States vs. *Patterson*, 205 Fed. 292.

No V.

Jackson, et al. vs. *Stanfield*, 137 Ind. 592.

Klingels Pharmacy vs. *Sharp & Dohme*, 104 Md. 218.

Bailey vs. *Master Plumbers*, 103 Tenn. 99.

No. VI.

In *Evanson* vs. *Spaulding*, 150 Fed. at 522, the cou
said:

"But, while the appellees have no right to pr
tection against competition, they have the right
protection against wanton and malicious interfe
ences and annoyances. . . . Their sole purpo
appears to have been to interfere with and preve
sales by the appellees. This they accomplished
breaking in upon conversations, interrupting sale
and making false representations as to the natu
of the appellees' goods, and the manner in which the
treated the purchasers thereof and other offensi
acts. Their purpose was not to sell goods of the
own and thereby interfere with sales by the appelle
but it was, by pursuing a policy of molestation,
drive the appellees out of business and out of th
country. The right of competition furnishes no ju
tification for such acts." (Numerous cases cited.

See also same case, 149 Fed. 913.

Economist Furnace Co. vs. *Wrought Iron Ran*
Co., 86 Fed. 1010.

Attorney General vs. *National Cash Regist*
Co., 148 N. W. 420, 428.

No. VII.

See

United States vs. *Carter*, 217 U. S. 286.

City of Findley vs. *Pertz*, 66 Fed. 427.

Alger vs. *Keith*, 105 Fed. 105.

No. VIII.

In *Coats* vs. *Merrick Thread Company*, 149 U. S. 562
the Supreme Court of the United States addresses itsel
to the question of unfair competition in trade in the fol
lowing language:

"Rival manufacturers may lawfully compete fo
the patronage of the public in the quality and price o

their goods, in the beauty and tastefulness of their enclosing packages, in the extent of their advertising and in the employment of agents, but they have no right, by imitative devices, to beguile the public into buying their wares under the impression they are buying those of their rivals."

In *Sterling Remedy Co.* vs. *Eureka Chemical & Mfg. Co.*, 80 Fed. 105, the Circuit Court of Appeals succinctly states the law as follows:

"It is sufficient to say that both parties have the right to embark in this trade; each has the right to put forth every legitimate effort to increase its sales, even at the expense of its rival, so long as it refrains from representing itself as the rival concern, or from representing its goods as the goods of the rival concern."

In *Scriven* vs. *North*, 134 Fed. 366, the Circuit Court of Appeals says:

"In cases of unfair competition, which rest upon a somewhat broader principle than technical trade marks, actual fraud or misleading of the public, or conduct calculated to mislead it, must be shown by the proofs either of actual intention to do the wrongful act or of the adoption of means calculated to effect that result. . . . The general principle that no man has a right to pass off his goods as and for the goods of another is broader than the rules applicable to strict trade mark. In this country this principle is generally designated as 'unfair competition in business.'"

In *Proctor & Gamble* vs. *The Globe Refining Company*, 92 Fed. 357, the Circuit Court of Appeals of this Circuit has laid down the general principle of the law in the following language:

"Each case depends upon its own facts and circumstances, and must be decided upon the applica-

tion thereto of settled principles which have recei
no substantial modification in recent years. The c
dinal rule upon the subject is that no one shall,
limitation or any unfair device, induce the public
believe that the goods he offers for sale are the goo
of another and thereby appropriate to himself
value of the reputation which the other has acqui
for his own products or merchandise. *Canal Co.
Clark*, 13 Wall. 311; *Coats* vs. *Merrick Thread C*
149 U. S. 562. The substance of the rule is w
understood and it is unnecessary to make extens
citation of cases which have recognized it."

It has been declared to be unfair competition fo
competitor to adopt or simulate the labels or advertisi
literature of a manufacturer of a patented article a
thus practically adopt the literature, designs, *et cete*
of the injured party on its statements and prospecti.

See *Farmers' Handy Wagon Co.* vs. *Beaver S*
& Box Mfg. Co., 236 Fed. 731.

See also *Walter Baker & Co.* vs. *Gray*, 192 F
921.

Where, for illustration, one manufactures acetyle
gas for automobile illumination put up in metal co
tainers of peculiar construction, with an exchange syste
of empties, and a competitor puts out another gas f
similar use and purchases empty containers from patro
of the first party and puts out his gas in such empt
containers, to which is pasted a small paper label, t
court has declared the practice to be unfair competitio
because the public was manifestly deceived into believi
that the product purchased was that manufactured an
offered by the first party, whose rights were thus in
paired.

See

Prest-O-Light Co. vs. *Davis*, 209 Fed. 917, and
Search Light Gas Company vs. *Prest-O-Lig*
Co., 215 Fed. 692.

In *American Washboard Co.* vs. *Saginaw Mfg. Co.*, 103 Fed. 281, the court said:

"There are numerous cases in the reports upon the subject of unfair competition in trade. From the general principle runing through them all of it may be said that when one has established a trade or business in which he has used a particular device, symbol, or name so that it has become known in trade as a designation of such persons's goods, equity will protect him in the use thereof. Such person has a right to complain when another adopts this symbol or manner of marking his goods so as to mislead the public into purchasing the same as and for the goods of complainant. . . . In *Canal Co.* vs. *Clark*, 13 Wall. 322, 20 L. Ed. 583, the court said:

"'It is invariably held that the essence of the wrong consists in the sale of the goods of one manufacturer or vendor as those of another.'

"Mr. Justice Field, in *Goodyear India-Rubber Glove Mfg. Co.* vs. *Goodyear Rubber Co.*, 128 U. S. 604, 9 Sup. Ct. 168, 32 L. Ed. 537, said:

"'The case at bar cannot be sustained as one to restrain unfair trade. Relief in such case is granted only where the defendant, by his marks, signs, labels, or in other ways, represents to the public that the goods sold by him are those manufactured or produced by the plaintiff, thus palming off his goods for those of a different manufacturer, to the injury of the plaintiff.'

"See, also, *McLean* vs. *Fleming*, 96 U. S. 251, 24 L. Ed. 828, and *Chemical Co.* vs. *Meyer*, 139 U. S. 544, 11 Sup Ct. 627, 35 L. Ed. 249. In the latter case it was said:

"'The theory of a trade-mark proper being, then, untenable, this resolves itself into the question whether the defendants have, by means of simulating the name of plaintiff's preparation, putting up their own medicine in bottles or packages bearing a close resemblance to those of plaintiff, or by the use of misleading labels or colors, endeavored to palm off their goods as those of plaintiff.'"

In *Rathbone, Sard & Co.* vs. *Champion Steel Range Co.*, 189 Fed. 26, the Circuit Court of Appeals says:

> "The rule is well settled that nothing less than conduct tending to pass off one man's merchandise or business as that of another will constitute unfair competition."
>
> *Federal Trade Commission* vs. *Gratz*, 258 Fed. 314 at 316.

38 Cyc., page 576, says:

> "Unfair competition consists in passing off, or attempting to pass off, upon the public, the goods or business of one person as and for the goods and business of another. It consists essentially in the conduct of a trade or business in such a manner that there is either an express or implied representation to that effect and it may be stated broadly that any conduct, the natural and probable tendency and effect of which is to deceive the public so as to pass off the goods or business of one person as and for that of another, constitutes actionable unfair competition. The definition is comprehensive enough to reach every possible means of effecting the result."

Mr. Edward S. Rogers in his volume on "Good Will, Trade Marks, and Unfair Trading" discusses the law of unfair competition and at page 129 says:

> "So after several hundred years' development, the law of unfair competition has been crystallized into a single sentence—no one has any right to sell his goods as the goods of another."

Mr. Rogers then proceeds to enlarge upon this definition in the following language:

> "No one has a right to use any artifice or contrivance by means of which the sale of his goods as a rival's is accomplished either directly or indirectly, or will probably be accomplished by dealers who purchase from him. Will ultimate purchasers without active and actual passing off by either the producer or the retailer be likely to purchase the defendant's

goods in the belief that they are the goods of the complainant? It is of no consequence whether the deception is effected by imitation of trademark or name whether descriptive, geographical or personal, duplication of copying of device, label, color, design or get-up of enclosing package, duplication of catchwords, deceptive advertising, oral misrepresentation, silent passing off, or in any other way. Is one trader, directly or indirectly, expressly or by implication, making a false representation that his goods are those of a rival? It may be made in any of the myriad ways in which it is possible to convey impressions. The question in every case is: Is this false representation being made? And that question is a question of fact."

And again at page 137 we find this further definition nd application of the term "Unfair competition":

"It may now be considered established that after more than a century of struggle the law has put all cases of unfair competition, as that term is now understood, upon a common basis of fact. Is the defendant representing his goods as the goods of the complainant? If he is making this false representation by any means, however ingenious, the courts interfere and prevent the continuance of it by restricting or enjoining entirely the use of the efficient means by which it is carried out. Without attempting an exact classification or a comprehensive statement, because the contrivances of the infringer are as many and as various as the ingenuity of the dishonest schemer can invent, the common cases of unfair competition involve (1) the deceptive use of geographical names; (2) the deceptive use of personal names; (3) the deceptive use of descriptive names; (4)the imitation of the appearance and color of labels and the dress of packages; (5) the imitation of the form or peculiarities of packages or the configuration or visual appearance of the article itself; (6) the deceptive use of devices which, while having little physical resemblance, will cause goods to be known in the market by the same name; (7)

refilling distinctive genuine packages with spurious goods; (8) oral false statement and silent substitution; (9) deceptive advertising; (10) the false indication of geographical origin in a reputable district or locality, and the false assumption of membership in associations, unions and the like."

No. IX.

Consent decree entered in the case of *U. S.* vs. *F. S Bowser & Co., et al.*, Mch., 1920, U. S. The decree enjoins the defendants from doing any of the following charges in the complaint:

"(*a*) From making or causing to be made to customers or prospective customers of competitors, false representations concerning the standing, financial or otherwise, or the business methods of such competitors, with the purpose or intent to injure such competitors in their business; and from making any false representations concerning the quality of pumps tanks or outfits manufactured to meet the requirements of the National Board of Fire Underwriters.

(*b*) From bringing or threatening to bring suit against competitors, their customers or prospective customers, upon the claim, known to be false or not believed in good faith to be well founded, that the products of such competitors are an infringement of the patent rights of defendants.

(*c*) From hiring, bribing or employing architects, fire marshals, insurance representatives, or municipal officers or employees, to use their influence in promoting the sale of defendant's products, or in preventing the sale of the products of competitors.

(*d*) From procuring detectives, agents, or representatives to enter into or take employment in the factories, buildings, shops, or offices of competitors, without their consent, for the purpose of obtaining information concerning their business.

(*e*) From inducing or hiring draymen, railroad employees or other persons to obtain from shipments made by competitors, or from other sources, the

names and addresses of their customers; except that the traveling salesman of defendants, in making reports of prospective customers upon whom they have called, or employees engaged to make canvasses for the purpose of ascertaining the names and addresses of prospective customers, may report the name of the pump, tank or outfit owned by such prospective customer, if the purpose in so doing is not to injure in any manner the business of a competitor.

(*f*) From securing or attempting to secure, or bring about in any manner, the cancellation of orders taken or sales made by competitors, or interfering in any way with contracts entered into by competitors with purchasers of their pumps, tanks or outfits.

(*g*) From promising or agreeing to indemnify customers or prospective customers of competitors against losses from litigation or otherwise, on condition that they cancel their contracts with such competitors.

(*h*) From reducing the prices of pumps, tanks or outfits below the cost of production, or giving them away, in order to prevent sales by competitors; or discriminating in prices between different persons or localities with the purpose or intent thereby to destroy or injure the business of a competitor.

(*i*) From inducing or hiring salesmen, agents, or other employees of competitors to leave their employment, and enter the employment of defendants; but nothing in this section shall prevent defendants from hiring salesmen, agents, or other employees of competitors who shall have left, without any inducement from defendants, their employment and shall have applied to defendants for situations."

No. X.

In *Coca-Cola* v. *Butler*, 299 Fed. 224, the Court said:

"The well recognized rule of law is that the manufacturer of any article of food, drink or drug intended for consumption, or of any dangerous articles, may be liable to the ultimate purchaser and consumer

for negligence causing an injury, although there is no direct contractual relation between them, such an action resting on tort and not on contract." And cited these cases:

Waters-Pierce Oil Co. v. *Deselms*, 212 U. S. 159; 29 Sup. Ct. 270; 53 L. Ed. 453.

Standard Oil Co. v. *Murray*, 119 Fed. Rep. 572; 57 C. C. A. 1.

Huset v. *J. I. Case Threshing Machine Co.*, 120 Fed. Rep. 865; 57 C. C. A. 237, 240; 61 L. R. A. 303.

Riggs v. *Standard Oil Co.* (C. C.), 130 Fed. Rep. 199.

Keep v. *National Tube Co.* (C. C.), 154 Fed. Rep. 121.

Ketterer v. *Armour* (D. C.), 200 Fed. Rep. 322.

Mazetti v. *Armour*, 75 Wash. 622; 135 Pac. 633; 45 L. R. A. (N. S.) 213; Ann. Cas. 1915 C, 140.

Thomas v. *Winchester*, 6 N. Y. 397; 57 Am. Dec. 455.

Statler v. *Mfg. Co.*, 195 N. Y. 478; 88 N. E. 1063.

Wellington v. *Oil Co.*, 104 Mass. 64.

Roberts v. *Brewing Co.*, 211 Mass. 449; 98 N. E. 95.

Norton v. *Sewell*, 106 Mass. 143; 8 Am. Rep. 298.

Bishop v. *Weber*, 139 Mass. 411; 1 N. E. 154; 52 Am. Rep. 715.

Peters v. *Johnson*, 50 W. Va. 644; 41 S. E. 190; 57 L. R. A. 428; 88 Am. St. Rep. 909.

Peterson v. *Standard Oil Co.*, 55 Or. 511; 106 Pac. 337; Ann. Cas. 1912 A, 625.

Tomlinson v. *Armour & Co.*, 75 N. J. Law, 748; 70 Atl. 214; 19 L. R. A. (N. S.) 923

Dixon v *Bell*, 5 Maul. & Sel. 198.

No. XI.

MEMORANDUM OF AGREEMENT

AGREEMENT, made this day of , 191 , between the STANDARD OIL COMPANY (New Jersey), party of the first part, and of the of in the County of and State of New Jersey, party of the second part.

WHEREAS, the party of the second part is now purchasing Motor Gasoline from the party of the first part for sale to the consumers thereof and has requested the party of the first part to install an equipment on premises situate at in the of in the County of and State of New Jersey, for the better storage and handling of the Gasoline so purchased; and

WHEREAS, in compliance with said request and for the purpose so stated, the party of the first part is about to place upon the said premises of the party of the second part,

NOW THIS AGREEMENT WITNESSETH, that the said parties have agreed and do hereby agree as follows:

1. That the said equipment shall be used solely for the storage and handling of Motor Gasoline purchased by the party of the second part from the party of the first part for the purpose aforesaid.

2. That the party of the second part will at own cost and expense maintain said equipment in good condition and repair so long as shall continue to use the same.

3. That the party of the second part will not encumber or remove said equipment or do or suffer to be done anything whereby said equipment or any part thereof shall be seized, taken into execution, attached, destroyed or injured or by which the title of the party of the first part to the same may in any way be altered, disturbed or prejudiced.

4. That in case the party of the second part should at any time use the said equipment for any other purpose than the storage and handling of Motor Gasoline purchased from the party of the first part, or should cease for thirty (30) days to purchase Motor Gasoline from the party of the first part and sell the same in regular trade, the right or license of the party of the second part to use the said equipment shall terminate and the party of the first part shall thereupon have the right to enter upon the said premises and remove the said equipment and every part thereof.

5. That the party of the second part shall indemnify and save harmless the party of the first part, its successors and assigns, of and from any and all liability or claims for loss, damage or injury to persons or property (including, but not by way of limitation, the party of the second part, agents, servants, employes, and representatives or the property of any of them) caused or occasioned by any leakage, fire or explosion of Gasoline stored in said Tank or contained in or drawn through said Pump, or by or in the installation, maintenance, repair, or use of the said equipment, or any of the attachments or appliances used, connected, installed or furnished therewith, whether due to latent or patent imperfection or to any fault in installation, and whether the same arises from negligence or otherwise.

6. This Agreement shall terminate forthwith upon the sale or other disposition of the said premises by the party of the second part and may be terminated by either party hereto upon Five (5) days' notice in writing to the other party. Upon any such termination hereof the right or license of the party of the second part to use the said equipment shall terminate, and the party of the first part shall then and thereafter have the right to enter upon said premises and remove the said equipment and each and every part thereof.

IN WITNESS WHEREOF, the said parties have caused these presents to be duly executed the day and year first above written.

STANDARD OIL COMPANY (N. J.)

WITNESS:

By.....

Manager.

WITNESS:

.....

.....

The undersigned, being the owner of the above mentioned premises occupied by the party of the second part to the above Agreement, hereby consents to the placing of the equipment therein mentioned on such premises and agrees with the party of the first part that the title thereto shall remain in such party of the first part during the continuance of this Agreement or of any renewal thereof, and that it may remove said equipment from such premises whenever it desires so to do.

.....

WITNESS:

.....

No. XII.

[PUBLIC—No. 203—63D CONGRESS.]

[H. R. 15613.]

An Act To create a Federal Trade Commission, to define its powers and duties, and for other purposes.

* * * * * *

SEC. 5. That unfair methods of competition in commerce are hereby declared unlawful.

The commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, and common carriers subject to the Acts to regulate commerce, from using unfair methods of competition in commerce.

Whenever the commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition in commerce, and if it shall appear to the commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect, and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the commission requiring such person, parntership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the commission, to intervene and appear in said

proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the commission. If upon such hearing the commission shall be of the opinion that the method of competition in question is prohibited by this Act, it shall make a report in writing in which it shall state its findings as to the facts, and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition. Until a transcript of the record in such hearing shall have been filed in a circuit court of appeals of the United States, as hereinafter provided, the commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or isued by it under this section.

If such person, partnership, or corporation fails or neglects to obey such order of the commission while the same is in effect, the commission may apply to the circuit court of appeals of the United States, within any circuit where the method of competition in question was used or where such person, partnership, or corporation resides or carries on business, for the enforcement of its order, and shall certify and file with its application a transcript of the entire record in the proceding, including all the testimony record in the proceeding, including all the testimony taken and the report and order of the commission. Upon such filing of the application and transcript the court shall cause notice thereof to be served upon such person, partnership, or corporation and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree affirming, modifying, or setting aside the order of the commission. The findings of the commis-

sion as to the facts, if supported by testimony, shall be conclusive. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the commission, the court may order such additional evidence to be taken before the commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by testimony, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon *certiorari* as provided in section two hundred and forty of the Judicial Code.

Any party required by such order of the commission to cease and desist from using such method of competition may obtain a review of such order in said circuit court of appeals by filing in the court a written petition praying that the order of the commission be set aside. A copy of such petition shall be forthwith served upon the commission, and thereupon the commission forthwith shall certify and file in the court a transcript of the record as hereinbefore provided. Upon the filing of the transcript the court shall have the same jurisdiction to affirm, set aside, or modify the order of the commission as in the case of an application by the commission for the enforcement of its order, and the findings of the commission as to the facts, if supported by testimony, shall in like manner be conclusive.

The jurisdiction of the circuit court of appeals of the United States to enforce, set aside, or modify orders of the commission shall be exclusive.

Such proceedings in the circuit court of appeals shall be given precedence over other cases pending therein, and shall be in every way expedited. No order of the commission or judgment of the court to enforce the same shall in any wise relieve or absolve any person, partnership, or corporation from any liability under the antitrust acts.

Complaints, orders, and other processes of the commission under this section may be served by anyone duly authorized by the commission, either (*a*) by delivering a copy thereof to the person to be served, or to a member of the partnership to be served, or to the president, secretary, or other executive officer or a director of the corporation to be served; or (*b*) by leaving a copy thereof at the principal office or place of business of such person, partnership, or corporation; or (*c*) by registering and mailing a copy thereof addressed to such person, partnership, or corporation at his or its principal office or place of business. The verified return by the person so serving said complaint, order, or other process setting forth the manner of said service shall be proof of the same, and the return post-office receipt for said complaint, order, or other process registered and mailed as aforesaid shall be proof of the service of the same.

* * * * * *

Approved, September 26, 1914.

No. XIII.

[PUBLIC—No. 212—63D CONGRESS.]

[H. R. 15657.]

An Act To supplement existing laws against unlawful restraints and monopolies, and for other purposes.

* * * * * *

SEC. 3. That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor seller, where the effect of such lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

* * * * * *

Approved, October 15, 1914.